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Degree of Doctor of Philosophy

BERNARD GERT'S THEORY OF MORAL RULES AND AMERICAN
PROFESSIONAL MILITARY ETHICS

By

Matthew W. Hallgarth

August, 2003

Chairman: Dr. Robert J. Baum
Major Department: Philosophy

This dissertation presents a *prima facie* case for the usefulness of applying Bernard Gert's theory of moral rules to American professional military ethics. Gert's moral theoretical goal is to describe the common moral system that all moral agents implicitly use to make moral decisions the way competent speakers of a language implicitly use a grammatical system to speak a language. Gert describes the key features of the common moral system and attempts to justify that description as accurate. Gert's moral theory also provides an explicit decision procedure to guide moral decision-making in concrete cases.

Gert has already argued in many articles and books that his moral decision procedure can be effectively used to make complex moral decisions in professional medical ethics. I use Gert's work in medical ethics as a springboard for investigating whether similar success is possible in American Professional Military Ethics. I argue that similar success is possible but limited.

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This dissertation is organized into an introductory chapter, four main chapters, and a concluding chapter. In chapter 2 I review the diverse literature that American military professionals have at their disposal to guide their moral decision-making in concrete cases. This literature is divided into two convenient categories, official documents and the literature of evaluation and aspiration. In chapter three I present a concise discussion of Gert's theory of moral rules, explaining key concepts he deploys and describing the moral decision procedure that is consistent with those concepts. In chapter four I review and assess Gert's important work in medical ethics in order to explore how and how effectively he has deployed his theory to make moral decisions in concrete medical ethics cases. Finally in chapter five, I apply Gert's moral theory to several concrete cases of varying complexity in American professional military ethics. Gert's theory provides a promising and concise moral decision procedure that, within limits, improves on but does not contradict the moral guidance provided in the official documents and the literature of evaluation and aspiration.

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MATTHEW W. HALLGARTH

A DISSERTATION PRESENTED TO THE GRADUATE SCHOOL
OF THE UNIVERSITY OF FLORIDA IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

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2003

To my lovely wife and our three beautiful children. Their support, encouragement, and prayers were timely and necessary for completing this project. Also to my parents for nurturing in me a love of learning and a determination to keep pressing ahead. Finally, to my former supervisor at the U.S. Air Force Academy Center for Character Development, Lieutenant Colonel Mick Fekula, USAF (retired). He lobbied hard and overcame many administrative hurdles on my behalf. Without him I would never have had this opportunity.

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The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government

TABLE OF CONTENTS

	<u>page</u>
ACKNOWLEDGMENTS.....	iii
ABSTRACT.....	vi
CHAPTER	
1 INTRODUCTION.....	1
2 REVIEW OF CONTEMPORARY PHILOSOPHICAL LITERATURE OF AMERICAN PROFESSIONAL MILITARY ETHICS	7
Official Documents.....	9
Literature of Aspiration and Evaluation.....	32
Conclusion	84
3 GERT'S DESCRIPTION AND JUSTIFICATION FOR THE COMMON MORAL SYSTEM.....	86
Introduction.....	86
Reasons Gert Provides For Why His Theory Is Better Than the Alternatives.....	87
The Common Moral System	95
Human Nature	100
Rationality and Irrationality	101
Impartiality.....	111
Publicity	117
Moral Rules.....	121
Moral Ideals	141
Moral Virtues	152
Justifying Violations of Moral Rules	158
The Two-Step Procedure	168
Moral Disagreement.....	180
Summary	186
4 GERT'S CONTRIBUTION TO PROFESSIONAL MEDICAL ETHICS	188
Introduction.....	188
Gert's Credentials	189
Gert's Response to Recent Trends.....	191
Gert and Concrete Medical Ethics Cases.....	195
Gert's Analyses of Four Medical Ethics Cases	195
Some Criticisms of Gert's Cases Analyses.....	235
Is Gert Faithful to His Decision Procedure?	260

Gert's Successes	265
Casuistry and Gert.....	272
The Need for Policy	275
5 GERT AND AMERICAN PROFESSIONAL MILITARY ETHICS	277
Setting the Military Profession Apart	280
Core Concepts of the American Military Profession	282
Analyses of Military Ethics Cases	297
6 CONCLUSIONS	355
Tying It Together	357
Fotion and Elfstrom, Axinn, Gabriel, and Hartle Revisited.....	360
Gert's Potential Contributions to American Professional Military Ethics.....	373
BIBLIOGRAPHY	376
BIOGRAPHICAL SKETCH.....	384

CHAPTER 1 INTRODUCTION

This dissertation presents a *prima facie* case for using Bernard Gert's theory of moral rules and his two-step decision procedure to make moral decisions in the American military profession. Gert's theory can clarify how moral judgments in the American military profession are made. His theory can also be used to evaluate moral judgments that have been made, and guide professionals considering what moral decision to make, particularly in controversial cases where competing professional duties conflict. While all persons encounter moral conflicts at different times, military professionals encounter them more frequently, particularly in the exigencies of battle, where the consequences of decisions are usually very grave.

There are three primary reasons for investigating the utility of Gert's theory in the American professional military context. First, Gert's theory is relatively unique in that it is both theoretically rich and practically useful. Gert's theory of moral rules provides an explicit description of the common moral system that he argues all rational moral agents implicitly use. His theory provides a useful decision procedure for making moral decisions in concrete cases. In short, Gert's theory seems to do a good job of bridging the gap between theory and practice. This is an important result.

Second, Gert has already demonstrated the explanatory power and practical applicability of moral theory and decision procedure in professional medical ethics. This success suggests a reasonable possibility that Gert's moral theory and decision procedure may be similarly effective as a theoretical guide for American professional military ethics. Gert and several colleagues such as Charles M. Culver and K. Danner Clouser have shown how Gert's moral theory and decision procedure are effective at making moral decisions in complex medical ethics cases. Gert's two-step procedure for making moral judgments provides a method for isolating morally relevant facts

and assessing whether proposed violations of moral rules in making medical treatment decisions are strongly justifiable, weakly justifiable, or unjustifiable. Gert has considerable hands-on experience in the medical ethics field as an ethical consultant at various hospitals and medical associations. Through his work in medical ethics, Gert has demonstrated that professional medical ethics is not separate but a part of the common moral system that all moral agents know, understand, and implicitly use to make moral decisions and judgments.

Third, Gert's theory, I think wisely, takes a scientific approach to assessing concrete moral issues in professional contexts. His goal is largely descriptive, i.e., to explain clearly and coherently the common moral system that is implicitly understood and employed by moral agents in the same way they implicitly understand and employ a grammatical system to speak a language. For Gert, an explicit description of this common moral system can help to empower moral agents to make better moral decisions and judgments in ordinary and controversial professional situations.

While Gert has written extensively to show how his moral theory and decision procedure can be used to assess and resolve a host of complex medical ethical issues, no one as yet made even a *prima facie* case for how his theory of moral rules might provide theoretical support and practical guidance for military professionals facing complex moral decisions. This dissertation will serve as that investigation.

In Chapter 2, I review the contemporary literature on American professional military ethics that provides at least implicit moral decision-making guidance. I break this literature down into two broad categories, official documents and literature of aspiration and evaluation. For American military professionals, the default position in seeking professional moral guidance is provided by the official documents. The official documents set legally binding standards and establish policies and procedures that American military professionals are expected to follow. These documents are myriad and diffuse and are often vague or ambiguous. These documents

include sources such as the U.S. Constitution, the Uniform Code of Military Justice, and many regulations. In contrast, the literature of aspiration and evaluation analyzes and discusses American professional military ethics from a variety of philosophical perspectives and professional orientations. This literature is not legally binding. As part of my review of this category of literature I will briefly discuss and assess a few contemporary philosophers who are well known in the field of American professional military ethics and who have written systematic works about the topic from a diversity of classical ethical perspectives. This review will be brief, expository, and selectively critical, exposing at least one weakness in each writer's views that I think Gert's theory can overcome.

In Chapter 3 I explicate Gert's description of the common moral system that he argues all moral agent implicitly use. I explain what this common moral system is by describing its general features, and I also explicate the key concepts Gert argues are necessary in order to describe the common moral system accurately and systematically. Gert's project is to provide an explicit description of how rational moral agents actually, and usually implicitly, make moral decisions and judgments and to provide a justification for why his description is more accurate than other normative theoretical alternatives. I will explicate the important concepts in Gert's theory, such as moral rules, ideals, virtues, and the important concepts of rationality, impartiality, and publicity. I will also explain Gert's two-step decision procedure for assessing whether proposed violations of moral rules are justifiable, and if so, what is the strength of their justifiability.

In Chapter 4, I review and assess Gert's contributions to professional medical ethics. I discuss Gert's account of the important theoretical relationship between his moral theory and professional medical ethics. This process involves discussing the relationship between universal moral rules, particular moral rules, professional moral rules, and the important and unique role that duty plays in professional ethics. This relationship, Gert argues, holds up even when medical ethics are discussed in terms of core medical ethics concepts that influence particular medical

treatment decisions. These core principles are competence, valid consent, confidentiality, and paternalism. In Chapter four I also review and evaluate how Gert has already employed his moral theory and decision procedure to analyze four controversial medical ethics cases. Along the way I briefly discuss Gert's criticism of the dominant paradigm in medical ethics over the last few decades, also known as "principlism," and explain why Gert thinks his approach to medical ethics is an improvement over it. To close the chapter I offer a few criticisms of Gert's analyses of these cases, some of which are criticisms of particular analyses and some of which are systemic.

In Chapter 5, I assess the usefulness of applying Gert's theory for American professional military ethics. If Gert's theory accurately describes the common moral system that all moral agents use implicitly to make moral decisions, then his description ought to be as relevant to American professional military ethics as it is in medical ethics. The American military profession is an institution governed by many moral and legal rules, and is an institution where it is frequently necessary for military professionals to make moral decisions that involve violations of moral rules that result in enormous amounts of harm. I will apply Gert's theoretical machinery, particularly his two-step decision procedure, to five select and diverse concrete military cases in order to see if his theory and decision procedure provides helpful guidance for making moral decisions and judgments in those contexts. This chapter underscores the limitations of any moral decision procedure, the presence of irresolvable but limited disagreement, the problem of training and education, and the limitations of time, duress, ignorance, and institutional pressures.

In Chapter 6 I present my summary and conclusions. In particular I emphasize that Gert's moral theory and decision provides better and more useful moral decision making guidance for American military professionals than Fotion and Elfstrom, Axinn, Gabriel, and Hartle.

Every human society has a primary interest in self-protection against threats to its internal and external security. Consequently, the literature on professional military ethics, including the

oral history of illiterate societies, is exceedingly broad, spanning all of human history in every society on every continent. It is therefore necessary to place some restrictions on the scope of this project.

I focus on ethics within the military profession, not on the ethics of when to use military force. Military professionals do not select their wars, though they have wide latitude in making the specific moral judgments about how to fight them. Thus, this dissertation will not discuss morality and war generally. Military professionals are not legally empowered to make judgments about whether a war is morally justifiable. In all modern cultures of the first world, civilian authorities make those judgments. This dissertation focuses on complex or controversial moral decisions that military professionals make in specific circumstances that they are likely to face when performing their duties. One or more of these cases I analyze will involve peacetime functions of the military, to include such topics as humanitarian missions, appraisal standards, training decisions, and balancing constitutional rights with military necessity. Applying Gert's theory to American professional military ethics obviously includes many decisions other than moral decision during *war*, even though it is likely that every case has at least a tacit relationship to the application of military force.

I also restrict the scope of this dissertation by focusing on the contemporary American scholarship. The literature on professional military ethics is immense, covering thousands of years of human history, and includes sources such as biographies, plays, treaties, political documents, and myths. Contemporary philosophical literature on the topic of professional military ethics relies a great deal on this tradition and history coupled with contemporary analyses of moral issues relevant and of interest to military professionals serving in the American military profession today. Cadets at the United States Air Force Academy are required to read authors such as Sun Tzu and to discuss the Leiber Rules. While it is possible to trace some influences on

contemporary professional military ethics to authors like Aquinas, Sun Tzu, or works like Shakespeare's *Henry V* and the Old Testament, I will not discuss them.¹

The final way I restrict the scope of this dissertation is to give significant but not exclusive attention to the few authors who have more recently written systematically on American professional military ethics. These authors are Fotion and Elfstrom, Axinn, Gabriel, and Hartle.² These authors devote significant attention to issues germane to contemporary professional military ethics. I will examine whether these seminal authors present rules or procedures that help military professionals make difficult moral decisions in the field. I will identify at least one serious weakness in each approach. In my conclusion (Chapter 6), I will briefly assess whether Gert's theory overcomes the weaknesses in these other systematic accounts.

¹ Other scholars have written effectively on this subject, e.g., James Turner Johnson.

² These authors have written treatises on professional military ethics from different ethical vantage points. Axinn take a Kantian position, Fotion a consequentialist position, Hartle a tradition and rights-based position, and Gabriel a virtue theory position that also stresses using codes of ethics. As a result, a focus on these authors allows me to broach the primary western ethical traditions as they are seen to be relevant to APME. Also worth consideration will be the historical casuistry of Walzer, and the Aristotelian/Rossian position of Wakin. Their perspectives will be discussed in Chapter 2.

CHAPTER 2

REVIEW OF CONTEMPORARY PHILOSOPHICAL LITERATURE OF AMERICAN PROFESSIONAL MILITARY ETHICS

All professions need an ethic to set the moral expectations for their members as they fill their crucial social roles. The military qualifies as a profession by even the strictest standards. Thus, this need for an ethic applies to the military profession too, where the consequences of moral failure are potentially enormous, and where decisions may involve exceptional risk for unnecessary evil on a massive scale. A professional military ethic is needed to externally and internally motivate members to serve legally, morally, and competently under the most extreme conditions. Most members of the American military profession are young and inexperienced and yet are given significant responsibilities over the lives of subordinates and expensive equipment in the management of lethal force, whether in war, constabulary peacekeeping missions, or humanitarian interventions. Ironically, most military personnel competently fulfill these responsibilities even though many are not even old enough by American law to consume alcoholic beverages.

The military profession also needs an ethic because some moral virtues are functionally necessary for military success.¹ A long and storied tradition supports this view. The American military profession also needs a professional ethic to insulate and indoctrinate its members against possessing values that are inimical to military culture. Some American values such as individuality and entrepreneurship may be beneficial for the client society as a whole, yet may be counterproductive in the same society's military culture. Some activities that are forbidden or

¹ Sir John Hackett and Malham Wakin are two scholars who have made this argument. See Sir John Winthrop Hackett, "Society and the Soldier: 1914-1918," in *The Profession of Arms*, The 1962 Lee Knowles Lectures, London: The Times Publishing Co., Ltd, p 44-53. Also see Malham Wakin, "The Ethics of Leadership I," in *War, Morality, and the Military Profession*, 2nd Ed, edited by Malham M. Wakin, Westview Press, Boulder, 1986, p 181-199. Reprinted from the *American Behavioral Scientist* vol. 19, no. 5, May/June 1976.

merely permitted by the society that the military profession serves are required of military professionals. Likewise, some activities that are permitted by the society are forbidden in the military profession.²

The distinction between American society and the American military society justifies the existence of a separate military justice system to enforce standards of behavior that civilian law does not, will not, or should not enforce, in order to create a military climate of good order and discipline. Such a climate increases the likelihood of mission success, even at the expense of some human rights.

In this chapter, I provide a brief survey of the most important contemporary literature on American Professional Military Ethics. I divide this literature into two broad and easily discernable categories, the *official documents* and the *literature of evaluation and aspiration*.

The *official documents* describe the professional expectations for members of the military. They are legally binding. These official documents describe ethical standards of conduct for military professionals in the same way the Hippocratic oath, laws, regulations, and the American Medical Association Principles of Medical Ethics describe ethical standards of conduct for physicians.³ Generally, standards written in the official documents establish *minimum* expectations for professional membership. When a military professional fails to meet these minimum standards, punishments may include censure, discharge, or even imprisonment. These minimum standards are also known as 'professional standards,' 'professional expectations,' 'professional duties,' 'professional responsibilities,' 'professional obligations,' 'professional requirements' and 'professional rules.'

² This may not seem obvious to the reader. Military professionals may be required to kill offensively, whereas civilians may only kill in self-defense. Additionally, military professionals may be required to learn to clean and use pistols, while civilians are only permitted to do so. Finally, civilians may engage in certain political activities that are forbidden of military personnel.

³ The AMA adopted the most recent edition of Code of Medical Ethics in June 2001.

The official documents clarify moral standards that are viewed as necessary if the American military profession is to succeed in fulfilling its responsibilities to American society. Systematic failure to obey minimal professional standards seriously impairs any military organization's ability to accomplish its missions. Since the military profession serves a necessary function in society, it must function successfully if the society is to sustain itself against threats to its security.

The consequences of systematic moral failure in the military profession are potentially catastrophic, including unnecessary death and destruction of people and property, conquest or occupation by hostile forces, permanent loss of territory, and unnecessary endangerment of national interests. Thus, it is crucial that the minimum ethical standards described in the official documents be known, understood and enforced by all members of the military, including appropriate legal and command authorities. The official documents are foundational for enforcing, teaching, training, and encouraging military professionals to take their duties seriously and to know and appreciate the grave consequences their moral failure may have on their profession and American society.

Official Documents

The force of law buttresses the professional expectations described in the official documents. The threat of institutional enforcement provides a potent external motivation for military personnel to obey minimum standards of behavior. However, these minimum standards are diffused in a large and cumbersome literature. A useful decision procedure would help make the standards easier to understand and apply.

The American military has never promulgated a formal code of ethics similar to those used, e.g., by the medical and legal professions. Gabriel, Fotion, DeGeorge, and Taylor are examples of scholars who in recent years have proposed and defended the use of formal codes of

ethics for the American military profession.⁴ These codes have not been adopted. In contrast, Stockdale's introduction to Gabriel's *To Serve with Honor: A Treatise on Military Ethics and the Way of the Soldier* offers a brief criticism of formal codes as a viable possibility for the military profession.⁵ The Joint Services Conference on Professional Ethics (JSCOPE) in 1984 was dedicated to the discussion of the merit and efficacy of codes. It is not that the military does not use various codes of conduct. The military academies each have and administer honor codes for cadets. There simply is no overarching formal code or codes for the American professional military ethic.

However, there *is* an identifiable American professional military ethic. This ethic is fairly consistent and is spelled out in specific official documents through the tradition and history of the United States. A taxonomy of the official documents that discuss this formal ethic includes the following.

- 1.U.S. Constitution
- 2.The Oath of Office
- 3.The Officers' Commission
- 4.Federal Law (which includes international law)
- 5.Regulations
- 6.The Uniform Code of Military Justice (UCMJ)
- 7.The Soldiers' Code of Conduct.

These sources provide authoritative guidance on moral issues in the American military profession, even though there is some disagreement about how to interpret the content of these documents and what is their rightful scope. These core documents explain moral and legal duties, responsibilities, and rights of military professionals. They explain the unique legal and moral

⁴ Richard Gabriel, *To Serve with Honor: A Treatise on Military Ethics and the Way of the Soldier*, Westport: Greenwood Press, 1982; N. Fotion, and G. Elfstrom *Military Ethics: Guidelines for Peace and War*. Boston: Routledge & Kegan Paul, 1986, p 66-85; Richard DeGeorge. "Defining Moral Obligations: The Need for a Military Code of Ethics," *Army* December 1984 pp 22-30; Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, New York: Bantam, 1971. Fotion actually proposes four codes for different professional military relationships.

⁵ Gabriel, op. cit., p xvi. To Stockdale, codes can over legalize and over externalize moral motivation to the detriment of the profession.

responsibilities for those in positions of authority, particularly those in command. And they describe specific soldierly virtues and values that are consistent with the highest ideals of military service, such as obedience, courage, virtue, honor, patriotism, valor, fidelity, and competence.

U.S. Constitution

The U.S. Constitution and what it represents is the ultimate object of every U.S. soldier's allegiance. Crucial professional values mentioned here are the separation of powers, the role of the President as Commander in Chief of the Armed Forces, and the principle of civilian control of the military.⁶ All American military professionals pledge to support and defend the U.S. Constitution and in doing so confirm that their loyalty is to the authority of the rule of law above a specific leader. The American military professionals' primary duty is to serve their client society. This service is required even if a majority of military personnel disagree with an administration's foreign and/or domestic policies.⁷

⁶ Anthony E. Hartle, *Moral Issues in Military Decision Making*, Lawrence: University of Kansas Press, 1989, p 53.

⁷ The film, *Seven Days in May*, Warner Brothers Studios 1963, illustrates why loyalty to the U.S. Constitution is fundamental, specifically to the rule of law and the principle of civilian control of the military. Made in 1963, the movie takes place during the height of the cold war. The President, played by Fredrick March, has negotiated a treaty with the Soviet Union to freeze and cut nuclear weapons. This treaty has whittled his approval ratings down into the twenties because most of the public does not trust the Soviet Union to honor the treaty. The people are afraid. A highly decorated chairman of the Joint Chiefs of Staff and former war hero, a general played by Burt Lancaster, is the man most citizens would rather have as President. Hawkish, he vehemently opposes the treaty on grounds of national security. The general plans a coup to coincide with a military exercise, and he has funneled money into forming a secret operation to seize control of national communications. The general's *aide de camp*, a U.S. Marine Corp colonel played by Kirk Douglas, discovers small clues and pieces together the general's plan. In the course of some excellent dialog, character development, and storytelling, the colonel sides with the president and his loyalty to the U.S. Constitution over his loyalty to the general and exposes the coup, even though he agrees with the general's policies. The colonel is instrumental to exposing and neutralizing the coup quietly with the help of the President's close advisors. His actions likely prevent a military dictatorship or a civil war. The President could just as easily have subverted the constitution by keeping power and not submitting to the rule of law. A veiled point in this movie is that, once the coup is suppressed, the president still presses to enact the treaty. Because of this unpopular treaty, he will not be reelected. The American political system will take care of what the general, who exaggerates the urgency, thought only a coup would cure.

Oath of Office

In the American military profession, the Officers' Oath of Office is laced with moral language that describes the professional expectations of commissioned military service.

I, (name), having been appointed a Second Lieutenant in the United States (Army/Navy/Air Force/Marine Corp), do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter, So Help Me God.⁸

Officers pledge loyalty publicly and formally to the U.S. Constitution as the embodiment of protection for human rights and respect for law, among other things. They pledge to bear true faith and allegiance (loyalty), and to well and faithfully discharge the duties of their office (meet minimum professional standards of behavior).

The officer's assumption of duties is self-imposed and the officer serves at the pleasure of the President. Reciting the oath is not a formal contract because the President may dissolve it at his discretion. Officers also may resign their commission. This freedom gives moral responsibility priority over contractual obligation.⁹ The officers' oath of office is intentionally vague in setting broad professional parameters. The officer has a variety of duties to discharge depending on the circumstances.¹⁰

⁸ *Title 5 United States Code*, Part III, Subpart B, Chapter 33, Subchapter II, Section 3331(5 U.S.C. Sec 3331) says that, "An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath:" From this point forward I refer to the United States Code in the abbreviated format shown in parentheses. The United States Code is available in full text at <<http://www4.law.cornell.edu/uscode/>>.

⁹ Wenker, Wakin, and Hartle share this view. Kenneth Wenker, *The Morality of Obedience to Military Authority*, Columbus: Ohio State University Press, 1978; Wakin, op. cit., p 181-199; and Hartle, op. cit., p 40-49.

¹⁰ The fact that officers can resign their commission at any time seems to assume the existence of an all-volunteer-force. If an officer is drafted, he is forced to serve in that capacity unless he fails to meet physical or mental standards or is deemed to be a legitimate conscientious objector. However, a drafted officer may resign if he has reason to believe he is being asked to obey illegal orders.

The enlisted soldiers' Oath of Office prescribes slightly different duties apart from the identical mandate to support and defend the Constitution and to bear true faith and allegiance to the same. The enlisted person enters into a binding contractual arrangement with the government. No commission is offered.

I (name) do solemnly swear/affirm that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.¹¹

In addition to taking the enlisted oath, enlistees sign an enlistment/reenlistment document that stresses both the enlisted soldiers' obligations and entitlements. The document briefly refers to current laws and states that enlistees must obey all lawful orders and perform all assigned duties. It stresses that enlisted soldiers are subject to the Uniform Code of Military Justice and may be tried by court martial for failure to meet standards, which amounts to a breach of contract. The enlisted contract contains an "ultimate liability" clause, entailing that soldiers may be required to die in the performance of their duties.¹² It specifies a length of time the contract is in force. To summarize the difference, while officers swear to discharge their duties, enlisted personnel commit to obey orders according to military law for a certain period of time.¹³

Commission

The officer's commission is the warrant for service, an offer to serve given by the President that is accepted when officers take the oath of office. The commission can be likened to a public vote for a presidential candidate. A majority vote, like the commission, is an expression

¹¹ 10 U.S.C. 502.

¹² Edward C. Meyer, "Professional Ethics is Key to Well-led, Trained Army," *Army* vol. 30, 1980, p. 14.

¹³ These differences are significant and explain why authors like Hartle ascribe 'professional' status only to officers, even though some enlisted troops have significant responsibilities to lead and direct other enlisted troops. The medical profession seems similar in this respect. Doctors voluntarily assume the responsibilities of medical 'officers' while nurses and other health care workers enter an employment contract to work in the profession and follow the doctor's instructions.

of confidence that the candidate can do the job. This expression of confidence is an offer to serve. It is accepted and sealed when the President-elect takes the oath of office and likewise when officer candidates take the oath of office. The U.S. Constitution requires that officers be commissioned; the United States Code (U.S.C.) prescribes the text. The offer describes the President's "special trust and confidence in the patriotism, valor, fidelity, and abilities" of officer candidates. It charges each candidate to carefully and diligently discharge the duties of the office and to obey the lawful orders of superiors.

As with physicians, the commission is offered after a period of education and training where candidates demonstrate themselves capable of handling the responsibilities and rigors of professional service and for being adaptive enough to assume new duties as they are assigned. An offer of a commission assumes that officers understand what the commission, if accepted, requires.¹⁴

Laws of War

Article VI, Clause 2 of the U.S. Constitution says that treaties are the law of the land. Thus, American military professionals are bound by law to obey international laws the government is signatory to through formal treaty. This linkage makes documents such as the Geneva and Hague Conventions a part of the American professional military ethic.

In their various field manuals, the military services of the United States confirm this fact, stating that they are obligated to, e.g., the Hague Conventions of 1899 and 1907, by the Geneva Conventions of 1929, and by the four Geneva Conventions of 1949. The four Geneva Conventions make it illegal (for signatories) to violate provisions that govern care of the sick and wounded on the battlefield, the sick and wounded at sea, prisoners of war, and the protection of

¹⁴ In the medical profession, a physician is deemed competent to enter the profession as a fully qualified member. In contrast, military officers enter the profession after having demonstrated the capacity to assimilate into the rigors of the profession successfully over time. The education of officers is ongoing and they are expected to professionally develop in order to assume greater levels of leadership and rank.

civilian populations.¹⁵ For example, the U.S. Army's *Law of Land Warfare* gives authoritative guidance on the core provisions of these treaties and conventions.¹⁶ This document also declares the binding legal force of these conventions on, in this case, Army personnel. "The customary law of war is part of the law of the United States."¹⁷

The laws of war demonstrate that civilized people recognize legal and moral restraints on initiating and waging war. In the United States, respect for laws of war as international positive law gained momentum with the drafting of the Lieber Rules, a compilation of customs of war composed in the form of a positive legal code. These rules were written by Professor Francis Lieber at the behest of President Lincoln in order to provide moral and legal guidance during the American Civil War.¹⁸ The Lieber Rules were subsequently used in the trial to convict Captain Henry Wirz of war crimes for the inhumane way he commanded the Andersonville prison during the American Civil War. Captain Wirz was executed for war crimes.¹⁹

That some conduct in war is considered morally unjustifiable is not a contemporary phenomenon. Only its codification into positive international law is. Traditions of moral restraint in war are ancient. For example, the Hebrew Bible states that though it may be necessary to kill one's enemy, it is never permissible to cut down his fruit trees.²⁰ In the sixth

¹⁵These conventions were ratified on 12 August 1949.

¹⁶ U.S. Army Field Manual 27-10 (FM 27-10), *The Law of Land Warfare*, Washington DC: Department of the Army, 1956, revised in 1976. This manual is nine chapters with an appendix that gives an index of the provisions of the Hague and Geneva Conventions. Online posting <<http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/toc.htm>>.

¹⁷ FM 27-10, op. cit., p 7.

¹⁸ Elizabeth Flower, "Ethics of Peace," in *Dictionary of the History of Ideas*, vol 3, ed. Philip P. Wiener New York: Charles Scribner's Sons, 1973, p. 444. According to Flower, Francis Lieber, while teaching Kant's moral philosophy at Columbia University during the U.S. Civil War, used premises from Kant's *Perpetual Peace* to craft a code of conduct for armies that President Lincoln commissioned.

¹⁹ See William Hesseltine, *Civil War Prisons*, Kent, Ohio: Kent State University Press, 1972.

²⁰ Deuteronomy 20:19, New International Version.

century B.C. the *Hindu Laws of Manu* specified, "When the King fights with his foes in battle, let him not strike with weapons concealed in wood, nor with barbed, poisoned, or flaming arrows."²¹

Some contemporary historical events were instrumental in prompting the codification of laws of war, such as the use of poison gas in WWI, the Nazi atrocities exposed at the Nuremberg trials, intentional allied bombing of civilian population centers in WWII, and the poor treatment of American prisoners of war during the Korean conflict.

This plethora of international covenants, treaties, conventions, and customs can be confusing to military personnel. This confusion provides a fairly strong argument for adopting a succinct code of ethics or decision procedure for U.S. military personnel that captures the salient features of these disparate documents.

A few core moral rules of war can be distilled from these covenants, treaties, conventions, and customs. First, destruction in pursuing military objectives should be proportional to the value of the objective. This principle places utilitarian restrictions on harms. Second, military operations should be subject to the principle of military necessity. The Principle of Military Necessity admits that harming persons and property is *prima facie* bad. Thus, harming living persons and property, including those of the enemy, ought to be limited to the minimum level necessary to achieve legitimate military objectives.²² Unnecessary harm is both immoral and illegal. According to the principle of military necessity, whatever is permissible has to also be necessary, but not every action that is necessary is permissible.²³

²¹ A good translation of the *Hindu Laws of Manu* is George Buhler's translation from 1886. See <<http://www.sacred-texts.com/hin/manu/manu01.htm>> for a full text of his translation.

²² Chapter 1 of U.S. Army FM 27-10 mentions many of these principles, such as the principle of military necessity. Online posting <<http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/Ch1.htm>>.

²³ I explain this point as follows. It is permissible generally to kill enemy soldiers during war, but that alone does not justify killing enemy soldiers indiscriminately. If the killing is unnecessary, it is no longer permissible. On the other hand, just because killing some enemy soldiers is necessary for achieving some military goal does not make it permissible. The military goal might be superfluous to larger aims.

Another principle distilled from the laws of war is the principle of noncombatant immunity. Civilians and their property should not, *prima facie*, be subjected to military force intentionally. Military force should be intentionally directed only at military objectives. This principle is subject to interpretation on what counts as 'military' and 'civilian.' In the older Hague Conventions, specific targets such as churches, hospitals, historic landmarks, art museums, and undefended towns with no relevant military value were prohibited from being targeted. These discriminators remain largely unchanged to this day.

Scholarly debate over the force of the laws of war varies, even though most contemporary governments and military establishments accept them.²⁴ One reason for this acceptance is utilitarian. Bombing a civilian or military hospital is a waste of a perfectly good bomb that could be used against a more threatening military target. Bombing hospitals accomplishes little except perhaps increasing resentment by an enemy whose defenseless citizens are needlessly harmed.²⁵

Philosophically, an important issue to consider with respect to the laws of war is the question of how they are to be viewed. Are they merely codified customs like traffic laws in different countries? Do they only have the moral force of promises or contracts, making nonsignatories immune from moral culpability? Or are they grounded in deeper moral principles? Embedded in this scholarly debate are philosophical questions about whether the violations of the laws of war in a particular case are intended or not, foreseen or not, the result of negligence, or a justified response to a grave threat of annihilation by a clear evil.

²⁴ This debate often centers on whether one takes a natural law view or a positive law view. A classic Hobbesian would most likely think that international laws are meaningless without some power to enforce them. This is the positive law position.

²⁵ See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York: Basic Books Inc., 1977, p 255-257. Walzer provides a lucid discussion on the moral issues surrounding bombing civilian targets intentionally.

Federal Law

Federal law codifies the moral responsibilities of American military professionals. For example, Title 10, U.S. Code (1956) specifically spells out laws that govern the armed forces. Section 3583 of Title 10 describes general moral "Requirements of Exemplary Conduct." In this section, military professionals in positions of authority have a general duty to exemplify the following character traits and initiatives.

1. Be a good example of virtue, honor, patriotism, and subordination.
2. Take necessary and proper measures to safeguard the general welfare of those under your command or charge.
3. Be vigilant in inspecting conduct and correcting unacceptable conduct.²⁶

Other parts of Title 10 address specific moral obligations of commanders with respect to treating subordinates. For example,

Commanding officers and others in authority shall take all necessary and proper action ... to promote and safeguard the morale, physical well-being and general welfare of the officers and enlisted men under their command and charge.²⁷

Uniform Code of Military Justice (UCMJ)

The UCMJ supplements the civil and criminal statutes that govern civilians. In general, acts illegal for civilians are illegal for military professionals, though the reverse is not necessarily true. A separate military justice system is required because it is functionally necessary for some acts to be considered military crimes that it would be wrong to consider as civilian crimes.²⁸ The

²⁶ 10 U.S.C. 3583. The requirements for exemplary conduct are written at different times for the sections that pertain to the different services. The principles are the same except for the branch of service mentioned. This reference pertains to the U.S. Army. I am not quoting here.

²⁷ 10 U.S.C. 5947.

²⁸ One example comes to mind. In the U.S., a person can accumulate debts and then enjoy the protection of the bankruptcy laws. While it is arguable that this irresponsible behavior is immoral, it is not illegal for civilians. Declaring bankruptcy will hurt one's credit rating and a few other financial freedoms for a limited period of time. This behavior is illegal according to the UCMJ and may be punished. Or consider the following example. It is not illegal for an employee to not show up for work. He may lose his job, but he won't be put in jail except in a few crucial occupations. But for a military member to not show up for work is a serious crime punishable by imprisonment, and in some battle situations, death. Hartle discusses

courts have upheld the need for a separate military justice system. The Supreme Court upheld that the general articles of the UCMJ are not so unnecessarily vague and invasive as to be unconstitutional.²⁹

The UCMJ codifies military law and elaborates on the moral obligations explained in Title 10 U.S.C. Most of the UCMJ focuses on protecting the rights of service personnel including the right of due process and the protection and welfare of subordinates.

Four *general* classes of crimes are discussed in the UCMJ; absence, disrespect and disobedience, combat misconduct, and abuse of public trust. These classes are addressed specifically in articles 77-134. Their content describes statutory military crimes, many of which are also obvious breaches of moral responsibility. These laws empower authorities to hold service members legally responsible for maintaining these professional moral standards, since the consequences of failure are potentially grave, including mission failure and unnecessary harm to innocent civilians.³⁰

‘Absence’ refers to the crimes of desertion, missing a formation such as a deployment, and absence without leave (being away from duties without permission). The military crime of disrespect and disobedience includes insubordination to superiors, mistreatment of subordinates, contemptuous words towards officials, and disobedience of lawful orders.³¹ ‘Combat

the relationship between the UCMJ and the American professional military ethics on p 189. Law and morality overlap more in the military than in the civil society.

²⁹ U.S. Supreme Court, *Parker v. Levy*, 417 U.S. 733 (1974), No. 73-206. In this case the court held that Congress may “legislate both with greater breadth and with greater flexibility” when making rules for military society than it can for civilian society.

³⁰ I should clarify here. Military law does not only exist because breaches hurt mission success. Some military crimes such as murder and rape are not military crimes only because they reduce mission success rates. Murder and rape are illegal because they cause harm in other, more fundamental ways. Military laws that are not also civilian laws are more heavily written with the goal of mission success in mind.

³¹ Contemptuous words towards officials refer to officers specifically. Article 88 of the UCMJ states, “Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.” Online posting

misconduct' refers to misbehavior before the enemy such as abandoning property one has been charged to defend. It includes cowardly conduct, casting away arms and ammunition, running away, forcing a commander to surrender, and aiding the enemy. Many of these crimes are capital offenses. 'Abuse of public trust' includes acts such as false official statements, negligent damage to military property, hazarding a vessel, malingering, and drunkenness on duty. It should be apparent that the UCMJ criminalizes more conduct than the civil justice system does.³²

The UCMJ has more enforcement power than civilian law as well, because it has a weaker standard for proving guilt. In the UCMJ, '*mens rea*' only requires proof of negligence and not necessarily proof of intent.³³ This weaker standard of proof puts additional emphasis on the importance of competence; soldiers may be found guilty of criminal dereliction, for willfully or negligently failing to perform duties, or performing duties in a culpably incompetent manner.

Articles 133 and 134 of the UCMJ are crucial but intentionally vague. This vagueness is viewed as necessary because these articles address a soldier's general duty to fulfill broad professional expectations. Articles 133 and 134 are called the 'general articles' because they provide wide latitude for interpretation. This latitude makes the relationship between law and morality a closer one than in the civilian justice system. Some articles of the UCMJ address violations that are illegal for both civilians and military personnel such as theft, murder, and discrimination. However, articles 133 and 134 generally make illegal certain behaviors that might only be considered immoral for civilians.³⁴

<<http://www.au.af.mil/au/awc/awcgate/ucmj2.htm#888.%20ART.%2088.%20CONTEMPT%20TOWARD%20OFFICIALS>>.

³² The punitive articles of the UCMJ discuss military crimes. In the UCMJ, see Chapter X. The other chapters deal with issues such as trial procedures and sentencing.

³³ U.S. Supreme Court, *Staples v. United States*, 511 U.S. 600 (1994). In this case the court defined '*Mens Rea*' as: "The state of mind indicating culpability, which is required by statute as an element of a crime."

³⁴ I say this for civilians generally. Civilian professionals like doctors also operate in an environment where professional moral expectations may be supported by the force of law.

Article 133 of the UCMJ is strongly influenced by the customs and traditions of the U. S. military. It addresses “conduct unbecoming an officer”, i.e., acts that may disqualify officers from serving in their professional roles. The Manual for Courts Martial (MCM) says that Article 133 is based on the fact that “there are certain moral attributes common to the ideal officer and the perfect gentleman, the lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, and cruelty.”³⁵ These standards make punishable certain moral failures that compromise one’s standing as an officer and a gentleman. Examples of these moral failures might be cheating on an exam, associating with known prostitutes, not supporting one’s dependents, or slandering another officer.³⁶

Article 134 makes punishable “all disorders and neglects to the prejudice of good order and discipline.” The prejudice must be “reasonably direct and palpable.” This article stresses issues pertaining to character and virtue. It includes violations of the “customs of the service” that have attained the force of law as common law. One example of a violation of article 134 is fraternization, i.e., improper socializing between officers and enlisted personnel. This custom developed because of a clear need for officers to be objective and fair when ordering enlisted subordinates to perform hazardous duties. This customary rule, now codified in the UCMJ, ensures that leaders maintain professional distance from enlisted subordinates that officers may have to order into harm’s way. Officers should not have the objectivity of their judgment impaired by a desire to preferentially protect some noncommissioned subordinates at the expense

³⁵ U.S. *Manual for Courts-Martial* (MCM), United States (2000 Edition) Part IV, Section 59. The 2000 Edition of the MCM is a complete revision of the 1984 MCM incorporating all Executive Orders (EO) through 6 Oct 1999. Online posting, 2000 <<http://www.jag.navy.mil/documents/mcm2000.pdf>>.

³⁶ The U.S. Navy ‘Tailhook’ scandal occurred at the 35th Annual Tailhook Symposium from September 5 to 7, 1991 at the Las Vegas Hilton Hotel. Officers’ actions at this event exemplified conduct unbecoming an officer. Naval officers were cited for indecent assault, indecent exposure, conduct unbecoming an officer, and failure to act in a proper leadership capacity. Ultimately the careers of fourteen admirals and almost 300 naval aviators were ruined. No court martials occurred. Frontline ran a special about this scandal in 1996 called *The Navy Blues: The Clash of Politics and Values in the Post-Tailhook Navy*, Frontline, Public Broadcasting Service, October 15, 1996. Online posting <<http://www.pbs.org/wgbh/pages/frontline/shows/navy/tailhook/disc.html>>.

of other subordinates under their charge. Even the appearance of this sort of favoritism is eschewed.³⁷

Other acts prejudicial to good order and discipline are conduct that discredits the military in the eyes of the public, makes military life more difficult in one's country, and negatively affects recruitment. Other acts punishable under article 134 are distinctly moral failures too, including adultery, dishonorable failure to pay debts, disloyal statements, altering a public record, breaking a medical quarantine, and wearing unauthorized insignia or decorations. While we might be inclined to negatively judge the character of a civilian who committed these types of acts, none of these acts are necessarily violations of civil laws.

Lesser violations of the rules stated in Article 134 are not always formally punished. Commanders and supervisors have many nonjudicial alternatives available to punish less serious violations of these provisions, such as letters of counseling, letters of reprimand, denial of reenlistment, and unfavorable comments in a service members annual performance reviews. Each of these nonjudicial measures can negatively affect a military career, such as nonselection for promotion.

The UCMJ confirms that officers are held to a higher moral standard than enlisted personnel. Factors such as one's rank, responsibilities, and maturity level may also influence assignment of culpability, even within the enlisted ranks. An 18-year-old private may be granted more leeway with some violations of rules and regulations than a Master Sergeant with 15 years of service. While the private might be punished, retrained, and returned to duty for a particular violation, the Master Sergeant might be dishonorably separated from the service, have pay garnished, or be imprisoned for the same violation. Article 134 is also crucial in that it is the chief statutory provision that reinforces a superior's right to inspect and correct the behavior of

³⁷ Some professional distance is maintained in the officer corps, particularly within an officer's chain of command. The custom is informal, and not prohibited by the UCMJ.

those under his command or authority, but only for disorders and neglects that are prejudicial to good order and discipline.³⁸

Code of Conduct

Congress passed the Code of Conduct in 1955, and revised it in 1977 and 1988. It is a nonpunitive moral guide of traditional soldierly principles and standards written in six short sentences for easy display in unit common areas or carrying in the service member's wallet. It is written in the first person and resembles a formal oath. There is no public ceremony that requires swearing allegiance to it. The Code of Conduct is not part of the UCMJ; rather, it is a personal conduct mandate that focuses on the conduct of prisoners of war. It says, among other things, that 'I', the soldier, am prepared to die, to keep faith with fellow prisoners, to take command if senior, to obey if not senior, and that 'I', the soldier, am responsible for my actions. The code sets limits and gives prisoners a target to shoot for. Interpretations of these provisions may be found in the official documents and the secondary literature.³⁹ The Code of Conduct is as follows.

1. I am an American. I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense.
2. I will never surrender of my own free will. If in command I will never surrender the members of my command while they still have the means to resist.
3. If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.
4. If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information nor take part in any actions which might be harmful to my comrades. If I am

³⁸ Inspections are restricted to what is necessary to maintain good order and discipline, which is necessary if the military will successfully accomplish its missions. Inspections are most routinely made of a soldier's person (uniform, hygiene, and bearing), gear (maintaining equipment in good working order), and performance (review of competence in performing mission essential tasks, individually and in teams).

³⁹ U.S. Army Field Manual 21-78 (FM 21-78), *Prisoner of War Resistance*, Washington DC: Department of the Army, 1981, p 5-10. FM 21-78 interprets this code and tempers some of its apparent legalism. More discussion of this code is provided in D.o.D. Instruction 1300-21.

senior I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

5. When questioned, should I become a prisoner of war, I am bound to give only my name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.
6. I will never forget that I am an American, responsible for my actions, and dedicated to the principles that made my country free. I will trust in my God and in the United States of America.⁴⁰

Breaches of this code of conduct are not legally punishable.⁴¹ It is, however, an officially sanctioned guide to conduct in the form of a concise reminder of general duties.⁴²

Service Regulations

Each military service has reams of regulations on every topic including, e.g., grooming standards, fitness standards, pilot rest requirements, safety rules, and maintenance procedures on artillery pieces. Generally, regulations describe policies and procedures that are believed to

⁴⁰ The Code came into existence by Executive Order 10631 on 17 August 1955 under the leadership of President Dwight D. Eisenhower. Executive Order 12017 on 3 November 1977 amended the Code by outlining the basic responsibilities and obligations of members of the United States Armed Forces. Executive Order 12633 on 28 March 1988 further amended the Code by removing gender-specific terms from Articles I, II, and VI. The standards of the Code represent basic obligations that apply to American military personnel regardless of whether they appear in a formal code. This cites the most current version. This code is restated in many places. I extracted the code from a search of the Federal Register. The text I copied came from online posting <http://www.archives.gov/federal_register/codification/executive_order/10631.html>.

⁴¹ It would be cruel to punish soldiers for noncompliance with this code of conduct. An experienced interrogator and torturer can break anyone down over time. However, probability of success can be improved. Past experience of captured Americans reveals that honorable survival in captivity requires that a service member possess a high degree of dedication and motivation. Maintaining these qualities requires knowing and believing in the advantages of American democratic institutions and concepts, love of and faith in the United States, a conviction that the U.S. cause is just, and faith and loyalty to fellow POWs.

⁴² This code of conduct illustrates how just the existence and awareness of a code can positively influence behavior. Prisoners during the Vietnam were taught this code of conduct and had to commit it to memory. Their behavior was superior to prisoners during the Korean War. They were better at staying unified, preserving the chain of command, and resisting their captors. I think H.L.A Hart provides a good explanation for this success. In *The Concept of Law*, New York: Oxford University Press, 1961. Hart argues that the presence and knowledge of a law makes those aware of it and who live where the law has jurisdiction take what Hart calls an "internal point of view." The idea is that simply knowing that there is a law (or a code) influences your behavior, even if no one enforces it. Dunn and Parks discuss controversial issues associated with this code. See Howard J. Dunn and Hays W. Parks, "If I Became a Prisoner of War ... " *Proceedings*, Washington DC: U.S. Naval Institute, August 1976, p 18-27.

positively influence mission success, improve morale, and protect expensive assets. For example, maintenance regulations protect expensive military equipment; hygiene regulations help to keep soldiers in healthy condition to perform their professional duties. Obeying service regulations is a professional duty *and* a legal obligation.

A few regulations discuss moral obligations overtly. These regulations elaborate on the rather terse moral language used in Title 10 U.S.C. For example, section B, paragraph 1000 of the U.S. Marine Corps Manual has three pages devoted specifically to moral standards and/or qualities to be instilled in all Marines. "Marines are expected to exert proper influence upon their comrades by setting examples of obedience, courage, zeal. ..." Officers carry "the presumptions of integrity, good manners, sound judgment, and discretion". Noncommissioned officers are expected to possess "initiative, firmness, kindness, and justice".⁴³ Similarly, the United States Air Force has a little monograph called the "Little Blue Book." This booklet discusses the importance of upholding the Air Force's Core Values of "integrity, service before self, and excellence in all we do," and provides a brief, understandable conceptual analysis of these three principles.⁴⁴ Each service also publishes its own officer guides that discuss the moral responsibilities of leadership. Finally, the U.S. Department of Defense (DoD) publishes "The Armed Forces Officer", a booklet written in 1950 (revised in 1988) that succinctly describes the professional expectations for honorable military service and gives advice on various moral situations that permeate an officer's professional duties, such as how to effectively manage

⁴³ U.S. Marine Corps, *U.S. Marine Corps Manual*, 18th ed., Sect. B, Para 1000, Washington DC: U.S. Marine Corps, 2001.

⁴⁴ Full text of the U.S. Air Force's (USAF) *Little Blue Book* is at <<http://www-ext.tinker.af.mil/coreval/bluebook.htm>>. This book describes and briefly discusses the USAF Core Values.

interpersonal conflict, counsel subordinates, improve and maintaining unit morale, and guidance on developing effective communication skills.⁴⁵

Failure to abide by the policies and procedures described in the military service regulations may bring negative institutional consequences even if the breaches are not clearly described as punishable offenses in the military justice system.⁴⁶ Members may receive reprimands, negative comments in one's official record, demotion, loss of promotion, or forfeiture of military pay. Breaches of regulations may negatively affect one's evaluation of suitability for continued service or affect the types of assignment for which a service member may be considered.⁴⁷ For example, failure to handle classified material according to regulations may lead to a soldier losing her security clearance.

Service members have a contractual obligation to obey the regulations of the branch of service to which they belong. This obedience is not unlike any employment contract, where the employee, as a condition for employment, agrees to be at work on time and to fulfill the duties of his job at a certain level of competence. It is unlike other employment contracts in that the service member's liability is unlimited and she cannot simply quit at any time. Some regulations specifically discuss the issue of moral duties, ideals, and virtues overtly. I discuss these special regulations below.

⁴⁵ This pamphlet is DoD General regulation 36A, *The Armed Forces Officer*, but is republished by each branch of service under separate numbering systems. In the U.S. Air Force, it is called "Air Force Pamphlet 190-13 (AFP 190-13), 1988.

⁴⁶ The military justice system gives blanket coverage to the imperative to follow service regulations. Generally, breaches of service regulations may be punished. The military justice system does not, however, prescribe a punishment for every regulation violation. That is left up to the commander or supervisor's discretion.

⁴⁷ In this case I refer to breaches of regulations that are not particularly egregious or demonstrate criminal neglect. Poor performers who are enlisted are separated by a denial of reenlistment when their current contract expires, assuming they want to continue serving in the military. Officers either get promoted on time or they are forced out of the service.

Ethics Regulations

The Office of Government Ethics (OGE) publishes an ethics regulation that prescribes standards of moral conduct for all members of the Executive Branch, which includes both the civil service and the military service. This regulation discusses general moral rules, discusses moral principles, and explains values to be exemplified. Examples of problems this regulation addresses are conflicts of interest, post service employment with government contractors, and limitations on the value of contractor gifts to government personnel.⁴⁸

The Department of Defense (DoD) publishes its own Joint Ethics Regulation that is more detailed than the OGE ethics regulation. The Joint Ethics Regulation (JER) provides a single source of ethical standards and moral guidance for all military personnel and civil servants in the DoD.⁴⁹ It provides guidance on potentially compromising situations that may arise in performing official duties. For example, the JER prescribes rules for resolving conflicting financial interests by placing a dollar threshold on the value of contractor gifts to government personnel, with special emphasis placed on contracting officers who obligate government funds for weapons systems, supplies, services, and military construction. The JER also prescribes rules, many based on statutes, concerning procurement integrity and post-service employment with government contractors. The JER also restricts political activities that DoD employees may engage in. It limits the type and scope of off-duty employment allowed, and discusses activities that connote a misuse of position. The JER is so detailed and complex that most government ethics counselors are attorneys.⁵⁰

⁴⁸ 5 CFR 2634-2641 describes the purpose of the Office of Government Ethics (OGE). Within these documents are 5 CFR 2635.101, specifically titled, "Standards of ethical conduct for employees of the executive branch." 5 CFR 2635.101 addresses government ethics specifically. See <http://www.usoge.gov/pages/laws_regs_fedreg_stats/oge_regs/5cfr2635.html>.

⁴⁹ The *Joint Ethics Regulation* (JER) is (DoD 5500.7-R) August 30, 1993. Full text of the JER is available at <http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/z>.

⁵⁰ The complexity of this regulation is problematic. Too many specific moral rules are nearly impossible for people to know, understand, and apply. People will eschew using them as a guide if they are too

The closing chapter of the JER gives more general ethical guidance, republishing Executive Order 12674, titled "Principles of Ethical Conduct for Government Officers and Employees."⁵¹ The JER also publishes a statutory *Code of Ethics for Government Service*, making this code a part of federal law. The text states that any person in government service should do the following.

1. Put loyalty to the highest moral principles above loyalty to persons, party, or Government department.
2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.
3. Give a full day's labor for a full day's pay; giving to the performance of his duties his earnest effort and best thought.
4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.
5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.
6. Make no private promises of any kind binding upon the duties of office, since the Government employee has no private word which can be binding on public duty.
7. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties.
8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.
9. Expose corruption wherever discovered.
10. Uphold these principles, ever conscious that public office is a public trust.⁵²

complex, especially under the restrictions of time, duress, limited resources, military necessity, and institutional pressures. Concise guidance and decision-making latitude would be more effectively accomplished by providing a simple code soldiers could use as a compass to make moral judgments in the field.

⁵¹ Full text of this Executive Order is available at <http://www.usoge.gov/pages/laws_regs_fedreg_stats/lrfs_files/xeorders/eo12674.html>.

⁵² The U.S. House of Representatives, in House Concurrent Resolution No. 175, July 11, 1958, 72 Stat. B12, provided for a Code of Ethics for all Government employees, including officeholders. Public Law 96-303, July 3, 1980, 94 Stat. 855, provided, "That, under such regulations as the Administrator shall prescribe, each agency shall display in appropriate areas of Federal buildings copies of the Code of Ethics

Another interesting but not well known feature of the JER discussed in this last chapter is that it also lays out a moral decision procedure. I include the steps below.

I. Define the Problem. Proceed from a general statement of the problem to specific statements of the decisions to be made. As you take the following steps, such as identifying goals and naming stakeholders, new problems or needed decisions may become apparent. Be willing to add these to your problem list as you go.

II. Identify the Goal(s). Proceed from a general statement of an end result both long term and short term. Be prepared to add to this list as you take the following steps. Goals are something to strive toward. They are statements of the best possible results. The very best is not always achieved for everyone. Many problems do not allow for "win/win" outcomes. Be prepared to fall somewhat short of some goals for the sake of ethics and other considerations.

III. List Applicable Laws or Regulations. Laws and regulations are basic constraints within which official decisions are made. Until all relevant laws and regulations are considered, ethical decision-making is impossible. Although it is conceivable that an ethical decision could violate a law or regulation, such circumstances are rare.

IV. List the Ethical Values at Stake. Listing the ethical values at stake can awaken you to problems and goals that you may not have otherwise considered. It may alert you to stakeholders you may not have recognized. Listing the values reminds you of your commitment to them at a time when the stress of the problem may cause you to forget.

V. Name All the Stakeholders. A stakeholder is anyone who is likely to be affected by a decision. Many stakeholders will be apparent because of the previous steps you already followed. More will occur to you as you give the matter a few minutes of thought. Do not forget to include yourself and the people who may depend on you for support, both at work and at home. As you list the stakeholders, try to note the way your decision could affect them. In other words, name what is at stake for the stakeholder.

VI. Gather Additional Information. This step is frequently overlooked. The stress from the problem urges speedy solutions. However, hasty decisions usually create problems of their own. Take the time to gather all necessary information. Ask questions, demand proof when appropriate, check your assumptions.

VII. State All Feasible Solutions. By this time, some feasible solutions will have presented themselves. Others may be found by sharing the lists and information you have pulled together and "brain storming." As you state the feasible solutions, note which stakeholders could be affected and what might be gained or lost.

for Government Service." See <www.lexrex.com/enlightened/laws/ethics.htm>. The exact text of the 1958 code was incorporated into the JER at Chapter 12, Section 3, Paragraph 12-300, and Chapter 2, section 1 when it was made official on 30 August 1993. It is also stated in 5 CFR 2635. Discovering this code surprised me. Evidently the services do not teach it or even make DoD personnel memorize it. Ironically, in 14 years as an officer in the U.S. Air Force, I do not recall ever seeing this code posted in unit common areas.

VIII. Eliminate Unethical Options. There may be solutions that seem to resolve the problem and reach the goal but which are clearly unethical. Remember that short term solutions are not worth sacrificing our commitment to ethics. The long term problems of unethical solutions will not be worth the short term advantages. Eliminate the unethical solutions.

IX. Rank Remaining Solutions. Other solutions may not be clearly unethical but may be questionable. You may have to rely on intuition or "gut feelings" to weed out these solutions. Put these possible solutions at the bottom of your list. Rank the remaining solutions, which are all ethical ones, in order of how close they bring you to your goal and solve the problem.

X. Commit To and Implement the Best Ethical Solution. Commitment and implementation are vital to the ethical decision-making process. Determining which solution is the best ethical one is a meaningless exercise unless implementation of the ethical solution follows. If the right decision is not implemented, the door is left wide open for others to implement unethical solutions.⁵³

It is apparent that discussion of professional moral expectations in the official documents is diffused in an ocean of government regulations. Unfortunately this fact makes the moral literature (such as the JER) in the regulations seem like just more regulations, rather than the special regulations that they are. The moral regulations should uniquely inform and influence how one obeys the other regulations in the performing professional duties.

The government describes legal requirements, moral requirements, and moral ideals in the official documents. In the military services there is generally greater overlap between legal and moral requirements than in the civilian world.⁵⁴ This overlap seems a reasonable policy in the military profession since the negative consequences of professional failure are high. It seems reasonable to ask why the American military profession does not streamline this diffused ethical literature by adopting a succinct set of moral rules that is indoctrinated, memorized, taught, and discussed as appropriate at different levels and technical specialties. This set of moral rules could

⁵³ DoD 5500. 7-R, p 158-159. This text is taken from <http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/>.

⁵⁴ A separate issue here is the extent to which bureaucracies like the military establishment breed excessive complexity and redundancy in regulations and other policies and procedures. If a lawyer is needed to interpret a military code of ethics, then it seems that something is amiss.

be supplemented by a succinct but reliable decision-making procedure. The JER code of ethics is ineffective and ignored.

A few scholars writing in the literature of evaluation and aspiration have recognized this need to streamline moral guidance in the military through something like a code of ethics and they have tried to argue the point. Their efforts have been unsuccessful. For example, in 1984 Richard DeGeorge proposed just such a code in an article titled "Defining Moral Obligations: The Need for a Military Code of Ethics".⁵⁵ His proposal argued that military professionals should be trained and educated in six moral tenets of the profession. Two of these are: "I shall always remember that those under my command are moral beings worthy of respect and I shall never command them to do what is immoral", and "I shall use the utmost restraint in the use of force, using only as much as necessary to fulfill my mission".⁵⁶ A few years later, Fotion and Elfstrom proposed four separate codes of ethics targeted at different professional relationships within the military. Three of these codes regulate behavior, i.e., one for relations between comrades, one for relations with the enemy, and a prisoner's code to regulate treatment of prisoners of war. The fourth code, Fotion and Elfstrom called the 'creedal code', because it mentions general concepts of duty and the military virtues.⁵⁷

Two influential scholars who have written on American professional military ethics in the last 30 years have also defended a need for codes of ethics, i.e., Fotion and Gabriel.⁵⁸ They argued that a succinct formal code of ethics would give clearer moral guidance to military

⁵⁵ Richard DeGeorge, "Defining Moral Obligations: The Need for a Military Code of Ethics," *Army*, December 1984, pp 22-30.

⁵⁶ These two stress the rights of subordinates, that the end does not justify the means, and that the principle of proportionality is obligatory in the achievement of legitimate military objectives.

⁵⁷ Fotion and Elfstrom, op. cit., 76-81. While Fotion and Elfstrom propose four specific types of codes, they do not provide content for those codes.

⁵⁸ Fotion and Elfstrom, op. cit., p 67-84; and Gabriel, op. cit., p 138-147. That important military ethics scholars are proposing codes of ethics suggests a trend in thinking. It suggests that the U.S. military needs help reorienting its moral compass, and that a reason for this need is a lack of simplicity in moral direction.

professionals serving in the U.S. armed forces. It would be easy to teach and indoctrinate these codes. It would promote ethical discussion. And, a code of ethics could serve as a baseline for revising and streamlining alterable elements of the official documents. It might even lead to measurable improvements to the military justice system.⁵⁹ In contrast, criticisms of codes of ethics are: 1. It externalizes incentives for moral behavior. 2. It makes military ethics too legalistic when context and flexible judgment are crucial. 3. Codes become mere slogans. 4. Unsophisticated persons perceive them as the end of ethical action, rather than as a guide.⁶⁰

Literature of Evaluation and Aspiration

The second category of professional military literature is broader, more analytic, and less well defined. I call this category the *literature of evaluation and aspiration*. This literature includes everything related to military ethics that is not included in the official documents. It focuses on a myriad of topics and takes many philosophical approaches, elaborating, interpreting and discussing the moral duties described in the official documents. It also assesses how effectively the military profession is currently meeting the professional responsibilities described in the official documents or how it met its professional responsibilities in past situations. Finally, this literature evaluates the status of the profession, diagnoses problems, and suggests correctives in response to perceived warning signs of profession-wide disintegration or specific situational failure.

⁵⁹ In my mind these are good reasons to implement a code. This strategy has been implemented with apparent success in Israel. The Israeli Defense Force (IDF) has a formal code of ethics called "The Spirit of the IDF". It codifies core values and traditions distilled from the Jewish religious system, the governing principles of the democratic state of Israel, and the IDF's fighting heritage. Their formal code has eleven core values, one of which is "purity of arms". "The IDF soldier shall use force and weapons to subdue the enemy only to the extent required, and shall refrain from causing unnecessary injury to human life—to body, dignity, and property". These core values are expressed in principles including rules of behavior in the face of the enemy and rules for those not on active duty. Another of these eleven principles is "discipline". "The IDF soldier shall act to carry out all that is required of him fully and successfully, according to orders, in letter and in spirit, within the framework of the law". Online posting <<http://www.idf.il/english/doctrine/doctrine.stm>>, 1996.

⁶⁰ Wakin, "The Ethics of Leadership I," op. cit., p 186. Also see John Ladd, *The Structure of a Moral Code*, Cambridge: Harvard University Press, 1957.

The literature of evaluation and aspiration can be in the form of legal arguments, philosophical arguments, spirited inspirational polemics, or a combination of the three. Sometimes this literature takes a case study approach to illustrate actual professional failure or success, to tease out the causes for this professional failure, and to propose reforms to prevent similar failures in the future. Sometimes this literature focuses on philosophical interpretations and conceptual analyses of moral standards described in the official documents, particularly where application of the standards is confusing, or in specific instances where an interpretation of professional expectations in a given context is needed to clarify existing policy.

Some of the evaluative literature praises or critiques the current state of American professional military ethics, a fairly stable tradition that, since the winter of the continental army's bivouac at Valley Forge, has been marked by the qualities of trust, affection, discipline built on mutual respect, and nurturing the autonomy of subordinates. Other literature in this category discusses the effectiveness of current education and training methodologies in the American military profession, proposing pedagogical changes that would more effectively inculcate a strong commitment to the moral rules, ideals, and virtues necessary for professional success.⁶¹

In the United States, the civilian authorities, the public at large, and the leaders within the military profession want troops of all ranks and specializations to strive to exceed minimum professional standards of conduct. Thus, some literature in this category is primarily inspirational. The military profession cannot function *with excellence* unless many of its members exceed the professional expectations described in the official documents. Imparting a strong commitment to exceed the minimum standards requires a variety of inducements including institutional peer pressure, rewards, and other encouragements. To require persons to do more

⁶¹ Two worthy examples of evaluative literature that focus on APME pedagogy are: Peter L. Stromberg; Malham M. Wakin; and Daniel Callahan, *The Teaching of Ethics in the Military* New York: Hastings Center, 1982; and Joseph G. Brennan, "Ethics Instruction in the Military: Teach Them Plato or Hammer It into Their Heads," *Naval War College Review*, vol. 4, 1989, p 55-65.

than professional duty requires is *prima facie* morally wrong. To encourage the same is *prima facie* morally permissible.

Some of the minimum professional expectations described in the official documents are legally required, some are only morally required, and still others are both.⁶² When members fail to live up to minimum professional expectations, there can be strong external incentives to comply, including punishment, censures, lost prestige, reduction in promotion opportunity, forfeiture of pay, and even discharge.

To run from a battle violates the minimum standards of professional service and is a legally punishable offense. To dive on a grenade to save the lives of one's comrades exceeds the minimum standards. Diving on a grenade may be a noble example of self-sacrifice, but failure to do so is not a legally punishable breach of standards. However, the American military profession uses these and similar examples of heroism to inspire members to exceed minimum professional standards. To make failure to dive on a grenade in any situation a legally punishable offense would be unrealistic and cruel, but praising and ennobling such behavior is consistent with inspiration. The literature and tradition support using these types of examples to encourage members of the profession to both routine and heroic levels of self-sacrifice.

Much of the American professional military ethics literature aims to motivate military professionals to exceed minimum professional standards. Militaries move from functional competence towards excellence when a significant number of its members exceed minimum standards consistently and enjoy doing so. The inspirational literature, though, is not just polemical. Heroic stories, actual and fictional, may be used in training environments to inspire similar dedication in new recruits or provide a fresh inspiration to veterans still serving. Also, much ceremonial ritual is used when soldiers are decorated for outstanding service.

⁶² Authors such as Joel Feinberg have discussed this relationship at length. See Joel Feinberg, *The Moral Limits of Criminal Law*, New York: Oxford University Press, 1984.

In this literature, philosophical rigor is also used to analyze the reasons for professional failures and suggest ways to inspire soldiers to avoid them in the future. Philosophical rigor is crucial to distinguish, e.g., between praiseworthy sacrifice and foolish sacrifice. Mustering great courage at the wrong time is not genuine courage. Philosophical analysis may be used to show what it means for "courage" to be applied appropriately in specific contexts. Philosophers such as Aristotle are studied in ethics courses at the military academies to clarify the distinction between foolhardiness and real courage.⁶³

The official documents are officially sanctioned and the literature of evaluation and aspiration is not. The official documents are written more as rules, policies, procedures, and institutional norms (customs), while the literature of evaluation and aspiration is generally written as academic articles for military and philosophical journals. With the exception of specific courts martial transcripts, the authors of the literature of evaluation and aspiration have more leeway to analyze moral concepts and specific issues in more depth than writers and maintainers of the official documents do. Both categories discuss professional virtues such as loyalty, courage, honor, and obedience, and both categories even discuss what classifies as honorable and loyal service in particular situations. Both distinguish ideals from duties and both take into account morally relevant factors like professional context and rank. However, the literature of evaluation and aspiration is a crucial supplement to the official documents because writers have more academic freedom to take controversial positions and make poignant criticisms that officials within the profession are not as free to incorporate into the official documents. Within the American military profession though, leaders have resources at their disposal that academic writers do not have in order to inspire behavior that exceeds minimum professional standards. Ceremonies, parades, promotions, retirements, rituals, and commander's calls do much of the work of inspiring soldiers from within the profession. Writers of the literature of evaluation and

⁶³ I say this with first hand experience. I taught ethics at the U.S. Air Force Academy from 1992-1996.

aspiration must rely on providing analyses and making philosophical arguments. Since the official documents do a lot of describing and listing, it is easier to construe their content as mere lists or slogans.

The literature of aspiration and evaluation sometimes uses real or fictitious case studies to reinforce philosophical arguments. Some of this literature explicitly aims to be inspirational and tries to motivate American military personnel to meet and exceed moral standards described in the official documents. Motivational tools include stories of heroism, superior teamwork, and overcoming seemingly insurmountable obstacles. In emphasizing the military virtues, character, honor, and the warrior ethos, the literature of aspiration and evaluation emphasizes the ideals of military service.

Emphasizing these ideals of service serves a crucial function. If the U.S. military is to be excellent and not just adequate, then inspiring personnel to strive towards the ideals of military service is necessary.⁶⁴ Since ideals are generally not legally enforceable, they must be inculcated through inspirational methods including ceremonies, traditions, education, and training (indoctrination). Writers, commanders, and other leaders use stories of exemplars that demonstrate the military ideals in action. Medal of Honor citations, stories of heroism, and historical accounts of great leadership in battle put the ideals in a context for the aspiring soldier to remember and hopefully emulate.⁶⁵ The importance of the inspiring function cannot be

⁶⁴ Ideals are unreachable, so no one measures up perfectly. However, it is still important to motivate service members to aspire towards the ideals. Gert's uses the phrase 'moral ideals' to describe these actions that people would like others to do, but which are not morally required. Only those actions for which obedience is morally required can properly be called 'duties'. Failure to do one's duty makes someone liable for punishment.

⁶⁵ The following Medal of Honor citation is a particularly influential example of what I am describing here. Lance P. Sijan was a cadet at the U.S. Air Force Academy in the early 1960s and his story is told over and over to new recruits. "While on a flight over North Vietnam, Capt. Sijan ejected from his disabled aircraft and successfully evaded capture for more than 6 weeks. During this time, he was seriously injured and suffered from shock and extreme weight loss due to lack of food. After being captured by North Vietnamese soldiers, Capt. Sijan was taken to a holding point for subsequent transfer to a prisoner of war camp. In his emaciated and crippled condition, he overpowered one of his guards and crawled into the jungle, only to be recaptured after several hours. He was then transferred to another prison camp where he was kept in solitary confinement and interrogated at length. During interrogation, he was severely tortured;

overstated. A military that excels is a military whose personnel routinely demonstrate virtues such as honor, candor, courage, initiative, obedience, and zeal. Inspiring commitment to strive for these ideals can mean the difference between mission accomplishment and mission failure.

Case studies of moral and leadership failure are also used in this literature, e.g., the immoral behavior of Lt. Calley at My Lai, or perhaps the fratricidal tactics of incompetent European generals in WWI. According to some writers, the duty to exceed minimum standards and excel in one's professional duties becomes stronger with increased rank.⁶⁶ There is strong institutional pressure to excel in the military culture. While failures to excel are not subject to formal punishment, peer pressure and denial of other perks and rewards is often its own source of punishment. Professionals who more often and/or more closely emulate professional ideals are promoted at higher rates and are more often rewarded with increased responsibilities like command or high-level staff positions. More respect and privilege follow. Thus, while there is no formal legal obligation to aspire to the ideals of American military service, there are, nevertheless institutional pressures to exceed these minimum professional standards.

Most of the philosophical literature in the literature of aspiration and evaluation makes some fundamental assumptions. War is a human activity as ubiquitous as government and can be a legitimate instrument of political authority. In this literature disagreements might concern when and how to employ military force, but would rarely take a pacifistic position. Second, writers generally accept the basic moral duties of American military professionals described in the

however, he did not divulge any information to his captors. Capt. Sijan lapsed into delirium and was placed in the care of another prisoner. During his intermittent periods of consciousness until his death, he never complained of his physical condition and, on several occasions, spoke of future escape attempts. Capt. Sijan's extraordinary heroism and intrepidity above and beyond the call of duty at the cost of his life are in keeping with the highest traditions of the U.S. Air Force and reflect great credit upon himself and the U.S. Armed Forces." Text of all Medal of Honor citations for American military professionals is available at <<http://www.army.mil/cmh-pg/mohviet2.htm>>, last revised March 3, 2003.

⁶⁶ This apparent dictum of common sense is expressed by Gabriel, op. cit., p 51-80; Hartle, op. cit., p 9-23; Roger H. Nye, *The Challenge of Command: Reading for Military Excellence*, Wayne, NJ: Avery Publishing, 1986, p 19; and Lewis Sorley, "Doing What's Right: Shaping the Army's Professionalism," in

official documents and the legal tradition that supports and reinforces these duties. Third, writers normally accept the constitutional provisions of civilian control of the military and the President's role as Commander in Chief of the Armed Forces. Fourth, American writers rarely disagree with the fundamental provisions of international law forbidding the use of inhumane methods such as exploding bullets, grenades with glass in them, poison gas, torture, or bombing hospitals.⁶⁷

Respect for the rule of law is strong. Disputes among writers are generally limited to interpretations of issues like military necessity, proportionality, and discrimination as applied to concrete cases.⁶⁸ Finally, writers implicitly recognize that civilian leadership usually decides *jus ad bellum* issues. Military duty requires applying the *jus en bello* criteria legally and morally to carry out missions assigned by civilian authorities, e.g., with morally and legally appropriate applications of the principles of proportionality, discrimination, and military necessity.⁶⁹ In the military, moral excellence is a necessary condition for functional excellence, but it is not a

Military Ethics and Professionalism: A Collection of Essays, James Brown and Michael Collins (eds) Washington DC: National Defense University Press, 1981.

⁶⁷ Generally this is true. Axinn has an interesting section that discusses what unfair burden the Red Lily effect might have on poorer nations. The Red Lily effect refers to the different effects a law can have on different economic classes. If an international law required that all officers wear gold insignia so they would be easy to identify, poorer nations would find it more difficult to obey the law than a wealthier nation. Axinn concludes that the provisions of international law are written in a way that effectively avoids these inequalities. Something as simple as colored cloth can distinguish military ranks just as effectively. Axinn, op. cit., p 168-169.

⁶⁸ Interpretive differences are often based on the moral principles a theorist argues are primary. A consequentialist like Fotion and a Kantian like Axinn might, e.g., disagree about how they would justify an international law against the use of poison gas. Fotion would tie the prohibition to minimizing harm, Axinn to its failure to respect the absolute dignity of human beings.

⁶⁹ In the introduction I distinguished the *jus en bello* criteria from *jus ad bellum* criteria, the former being the main concern of military professionals in the United States. At least one writer has argued that these two sets of considerations are not as rigidly separate as my introduction suggests. Walzer argues that some *jus ad bellum* considerations may influence decisions in the *jus en bello* arena, something he argues occurred during WWII. In his discussion of "supreme emergency", Walzer argues that when a threat is patently evil, as the Nazis were, and when your civilization is in immanent danger of annihilation by a threat of this nature, suspension of some facets of the *en bello* criterion of discrimination is justified as a last resort. This argument, of course, does not address the issue of the legality of orders when those orders call for the suspension of international laws and/or customs of warfare. It only supports the view that the two sets of criteria may influence one another. See Walzer, op. cit., p 251-269.

sufficient one. The military profession can execute an immoral mission in morally appropriate ways, given their unique social roles.

Thematic Literature

The philosophical literature on American professional military ethics also has four identifiable themes that receive extra attention in the literature of aspiration and evaluation. These themes are: military virtues, character in general, honor, and the warrior ethos. I will briefly review each of these themes in turn, citing numerous sources where these themes are discussed.

Military virtues

The official documents of the American professional military ethics describe military virtues that are necessary if the military arm of the U.S. government is to competently function. Examples of these military virtues are: courage, loyalty, obedience, selflessness, truthfulness, candor, discipline, competence, and integrity.⁷⁰ Also included at times are the virtues of commitment, patriotism, compassion, and tolerance.⁷¹ These military virtues are dispositional properties that good soldiers routinely exemplify in their actions. The military virtues are discussed at length in both the official documents and the literature of aspiration and evaluation. The official documents tend to list and define these virtues; the most thorough analyses of these virtues are found in the literature of evaluation and aspiration.

One well-discussed example in the literature of evaluation and aspiration is the crucial military virtue of obedience. A recent issue of the *Professional Ethics: A Multidisciplinary Journal* is devoted exclusively to articles about military obedience that were presented in

⁷⁰ U.S. Army, *U.S. Army Values: The Bedrock of Our Profession*, (DA PAM 600-68), Washington DC: U.S. Army, 1986, p 6-9; Nicolas Fotion, "The Military Virtues: From Aristotle to Skinner," unpublished presentation at the *Joint Services Conference on Professional Ethics*, January 1987; and Brennan, op. cit., p 55-65.

⁷¹ Hartle, op. cit., p 32; Michael Walzer, "Two Kinds of Military Responsibility," *Parameters*, vol. 6, March 1981, p 42-46; Clay T. Buckingham, "Ethics and the Senior Officer: Institutional Tensions," *Parameters* vol. 15, Autumn 1985, p 23-32.

Brussels in 2001 at an international conference on military ethics. Issues discussed here concern the morality of military obedience, conceptual problems with obedience, and difficulties associated with obedience in specific cases.⁷²

The right to disobey illegal orders may override the virtue of obedience.⁷³ Since there is frequently no time for discussion on the front because of factors like limited time, duress, epistemic limitations, and institutional pressures, training during peacetime must be rigorous enough to make obedience almost completely automatic. Within this tension between the functional necessity of obedience and the right to disobey illegal orders, Taylor and Wakin provided philosophical analyses of *respondeat superior* (I was ordered; my superior is responsible). Senior leaders who were indicted at Nuremberg for war crimes made this argument. Wenker discusses the requirement for obedience even in the face of coercion and a lack of informed consent.⁷⁴ The literature of evaluation and aspiration generally concurs that, though obedience is a necessary virtue, it is not exceptionless. In some situations, obedience is dysfunctional and/or vicious.⁷⁵ Obedience, then, is necessary and is strongly conditioned into soldiers; however, it should only be rendered to legal orders. Determining the legality of orders is difficult in some cases, and the soldier has the burden of making the determination. Taylor puts it this way, while implying that this decision making burden rests primarily on officers.

⁷² The enlisted soldiers' contract of service requires obedience as a trade for pay and other benefits. The enlistee pledges to "obey the orders of the officers appointed over me" with the proviso that they are legal orders. This qualifier counters a tendency in some despotic regimes to make obedience the chief virtue of military professionalism. Himmler said, "the Nazi soldier's bond is his obedience." Obviously obedience is necessary but not in itself sufficient for moral service in the profession. The fact that soldiers generally concur that orders should be obeyed even if one disagrees, does not understand, or does not want to obey supports the view that obedience is contractually obligated in addition to being seen as a military virtue.

⁷³ Wakin, Malham, "The Ethics of Leadership I," op. cit., p 187-189. See also Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, New York: Bantam, 1971; and Samuel Huntington's, *The Soldier and the State*, New York: Random House, 1957, p 73. Finally, the wrongness of using superior orders as a defense against the charge of war crimes can be found in FM 27-10, op. cit., p 182.

⁷⁴ Wenker, op. cit.

⁷⁵ Gabriel op. cit., p 41, 185-194; Hartle, op. cit., p 121, 169.

An officer has little choice but to assume the rightness of a governmental decision involving the country at war. Having made this assumption, he is honor-bound to carry out all legal orders and do his best to bring the war to a prompt and successful conclusion.⁷⁶

There has been a good deal of scholarly discussion of the responsibilities of the morally sensitive soldier when a military order conflicts with one's moral, legal, and/or professional judgment. Still, there is no precise, widely accepted moral guide or algorithm for determining which of a soldier's duties are obligatory or permissible in complex cases.⁷⁷ Military ethics shares this feature with ethics in other professions.⁷⁸ Guidance must be gleaned from one's training, experience, and study. Much has been written characterizing specific situations (past and hypothetical) where disobedience or dissent is a professional duty, or proposing rough ground rules to cultivate moral responsibility and discernment.⁷⁹ Hartle gives illustrative cases studies that accomplish this cultivation in the appendix of his 1989 book, *Moral Issue in Military Decision Making*.⁸⁰

The literature on the virtue of competence is sketchier than the literature on the virtue of obedience. Nevertheless, scholars and even historians agree that competence is functionally necessary. For example, Shelby Foote blames General McClellan's professional incompetence for his failure to seize the initiative against Lee's inferior forces during the American Civil War,

⁷⁶ Maxwell Taylor, "A Do-It-Yourself Professional Code for the Military," *Parameters* vol. 10, December 1980, p 11.

⁷⁷ I think that Gert's decision procedure can help on this point.

⁷⁸ The official documents spell out required duties ideals that should be encouraged. However, case-by-case determinations require moral judgment. Moral decisions are not deduced like geometric proofs. This shows a consistency between the official documents and Gert's position on moral judgment, each of which are consistent with Aristotle's view that one must not expect more certainty from the subject matter than the material allows.

⁷⁹ Gabriel, op cit., 162ff; Huntington, op cit., p 74-78.

⁸⁰ Hartle, op. cit.

particularly at the Battle of Antietam.⁸¹ Lincoln fired him for being tentative when he had superior forces and a clear strategic advantage.

A key issue associated with competence is the dichotomy between technical competence, which refers to being skillful in one's craft, and professional competence, which refers to the ability to apply one's craft skills towards morally acceptable goals. Hackett, Huntington, and Galligan argue for this view, that technical competence is not a sufficient condition for being a successful military professional. They argue that technical competence is never morally neutral but always serves morally appraisable ends.⁸² Hence, technical competence is necessary but not sufficient for a professional military excellence. Soldiers who are technically competent and who apply that skill to morally justifiable goals using morally acceptable methods are professionally competent.⁸³

The relationship between technology and American professional military ethics has generated some interesting work concerning the deleterious effects of technology on the military profession. The fact that the contemporary American military profession needs so many highly trained specialists to function prompted Gabriel to argue that technology has caused the military profession to imitate corporate America by adopting business management techniques instead of classic military leadership techniques. These business management techniques include an overemphasis on factors like cost effectiveness, bottom line numbers, productivity statistics, process models, and flow charts, as opposed to the timeless lessons of military leadership

⁸¹ Shelby Foote, *The Civil War: A Narrative, Ft Sumter to Perryville*, New York: Random House, 1958, p 747-752.

⁸² John Winthrop Hackett, *The Profession of Arms*, London: Times Publishing, 1963; Huntington, op. cit.; Francis B. Galligan, *Military Professionalism and Ethics*, Newport, RI: Naval War College Press, 1979.

⁸³ See Morris Janowitz, *The Professional Soldier*, New York: Macmillan, 1960, Chapter 2. In this chapter, Janowitz discusses what he saw as the military's segmentation into three groups. One of these was the battlefield leader, the second was the administrator, and the third was the military technologist. I do not think this is accurate. Now the battlefield manager must be technically competent too, i.e., understand subjects like mathematics, computers, satellite navigation, and mechanics. However, the military technologist working in a laboratory somewhere must not necessarily be heroic.

grounded in an acute understanding of facts about human nature.⁸⁴ To Gabriel, specialists like doctors and computer programmers serving in the American military have, like mere contract laborers, traded their skills for pay and benefits without developing the requisite military professionalism, i.e., assimilating fully into the military culture. Gabriel writes with the goal of restoring a service wide emphasis on the military virtues before the American military services completely morph into fragmented clusters of paid specialists who merely wear the uniform.⁸⁵ To fight this trend, Lerner argues for renewed emphasis on the military profession as a "higher calling" and not just an exchange of labor for pay and benefits.⁸⁶

Character in general

A focus on good character in general is also a noticeable theme of the literature of aspiration and evaluation. Chapter 1 of DOD GEN 36A, *The Armed Forces Officer*, explains that American military officers should expect, for the duration of their lives, to be viewed as representatives of all that is good in the national character. Chapter 1, Section 6 states that

The nation expects more from the military officer: It expects a living portrayal of the highest standards of moral and ethical behavior. The expectation is neither fair nor unfair; it is a simple fact of the profession. The future of the services and the well being of its people depend on the public perception and fact of the honor, virtue and trustworthiness of the officer corps.⁸⁷

⁸⁴ Gabriel, p 98 op. cit.; Wakin op. cit., p 208-210. Besides the influence of technology and specialization, Gabriel argues effectively for another cause corporate influence on the U.S. military profession and a waning emphasis on classic military leadership. According to Gabriel, Robert McNamara imported into the U.S. military business processes and practices he used effectively while working for Ford Motor Company. This led to a spurious stress on managing people like things rather than leading them as persons.

⁸⁵ Gabriel, op. cit., p 94-101. Technology has had an immense influence on the contemporary American military profession. The American military originated on a citizen-soldier model. This model became anachronistic when the need for technical competence necessitated having a large standing military force dedicated to long-term service and continuous training.

⁸⁶ Max Lerner, "The Shame of the Professions," *Saturday Review*, vol. 3, November 1, 1975, p 10-12, reprinted in Wakin, op.cit., p 134-137.

⁸⁷ DOD Gen 36A, op. cit., p 2.

There is evidence to indicate that the American public concurs, expecting their officers to be "paragons of virtue: guardians of threatened values."⁸⁸ The American public wants its military professionals to have strong moral character and to consider military service a way of life.⁸⁹

Character expectations are also discussed in the official documents. Article 133 of the UCMJ requires that military professionals provide for the needs of their spouses, children, and other dependents. The UCMJ also prohibits managing one's finances poorly. Paragraph 2501 of the *U.S. Marine Corps Manual* spells out these obligations in even more detail. In recent years the U.S. service academies have developed character and ethics centers to facilitate the character education of cadets and midshipmen. These centers are partly a response to the increasing cultural gap between the military profession and its client society. Academy leaders believe they can no longer rely on getting officer candidates that arrive from high school with crucial character traits such as loyalty, commitment, and selflessness already instilled from childhood.⁹⁰

Sarkesian, however, identifies potential problems that may arise when exemplary moral character is emphasized as a prerequisite for military professionalism, particularly for officers. According to Sarkesian, the superior's right to inspect and correct subordinates for all disorders and neglects prejudicial to good order and discipline (as permitted by Article 134 of the UCMJ) can create an oppressive glass house environment that may violate minimal privacy rights that even military professionals are entitled to.⁹¹ Sarkesian argues that the burden of proof is on those

⁸⁸ C.R. Kemble, *The Image of the Army Officer in America: Background for Current Views*, Westport, CT: Greenwood Press, 1973, p 142.

⁸⁹ Sam Sarkesian, *The Professional Army Officer in a Changing Society*, Chicago: Nelson-Hall, 1975, p. 7.

⁹⁰ The United States Air Force Academy Center for Character Development is one example of such an effort. It was founded in 1994 with the goal of influencing cadets to become future officers who internalize and live the Air Force core values of integrity, service, and excellence.

⁹¹ Sarkesian, op. cit., p 54.

in the military establishment who would take away individual liberties to show that violating a soldier's privacy is functionally necessary for mission success.⁹²

A second problem with emphasizing exemplary moral character in general as a prerequisite for military professionalism is as follows: Some character traits that are functionally necessary for soldiers to have are diametrically opposed to character traits that apparently make a person good in general. The legal profession provides an analog, since the functional virtues that make for a good counselor can conflict with the virtues we intuitively think make a normal citizen good. The good counselor may, e.g., be bound to defend a client she knows is guilty or to keep potentially incriminating evidence a secret. The same possibility exists for the military professional. Soldiers are encouraged to exhibit aggression and to be intimidating. Soldiers may psychologically need to depersonalize the enemy in their minds in order to manage the psychological impact of killing other human beings, which in itself is obviously not behavior that civilians with good character normally engage in. For this reason, critics like Sarkesian argue that what makes for a soldier of good character and what makes for a citizen with good character are vastly different.⁹³

Finally, to stress stellar moral character makes it easy to mistakenly conflate professional duties with professional ideals. This is a problem that Gert's moral theory solves, which I will discuss in Chapter 3 and 6. The following excerpt from the *Armed Forces Officer* (1988) illustrates this hazard. "The Armed Forces...have a certain tolerance for the possibility of human error, but being commissioned an officer reduces this tolerance to almost zero".⁹⁴ Conflating

⁹² Sarkesian's position fits right in with Gert's view of moral rules. For Gert, violations of moral rules have to be justified. Taking away someone's freedom violates a moral rule; hence, it has to be morally justifiable, in this case by the military establishment taking away freedom.

⁹³ Axinn, op. cit., p 138-151. Here Axinn discusses issues associated with the "Dirty Hands" problem and military command, the problem that sometimes leadership necessitates performing an action that is professionally necessary but morally wrong.

⁹⁴ DOD Gen 36A, op. cit., p 19.

duties and ideals leads to intolerance and creates a zero defects mentality. It destroys initiative, penalizes innovation, and squelches professional development through hands-on learning from mistakes. This perfectionism is a formidable cultural obstacle to encouraging military professionals to take risk and to seize initiative.⁹⁵

Honor

Honor is a theme that receives special treatment in the American military profession. The literature gives many definitions of 'honor', special dignity, good reputation, glory, but there is a consensus that it is a capstone, a crown of military professionalism. Arthur Dyck gives a sketchy definition of honor "the ability to recognize moral dilemmas and to have the integrity and strength of character to act on one's perception".⁹⁶ Gabriel likens 'honor' to "moral sensitivity" to the moral dimension of life. He also asserts that honor is crucial because it checks the temptation to be merely an efficient, destructive military technician. Soldiers with integrity behave honorably.⁹⁷

The U.S. service academies each have honor codes, all of which state that cadets will not "lie, cheat, steal, or tolerate those who do".⁹⁸ These honor codes prescribe moral rules that cadets may not violate without shameful disenrollment or probation. These cadet honor codes state minimum standards that carry a potent external motivation for compliance. However, a cadet

⁹⁵ Gabriel, op. cit., p 11. Gabriel argues that this zero-mistakes mentality was stimulated by the business-model influences of Robert McNamara in the 1960s. McNamara came from Ford Motor Company and brought his business methodologies to bear on the military services. A zero mistakes goal is reasonable when making automobile parts. Gabriel says that the model worked well with combat support functions, but failed at the troop level. At this level, men have to be led and not managed. Military leadership is people centered and not something that can be manipulated like an automotive assembly line.

⁹⁶ Arthur J. Dyck, "Ethical Bases of the Military Profession," *Parameters*, vol. 10, March 1980, p 44.

⁹⁷ Gabriel, op. cit., p 157.

⁹⁸ The Cadet Honor Code of the United States Air Force Academy states, "We Will Not Lie, Steal Or Cheat, Nor Tolerate Among Us Anyone Who Does. Furthermore, I resolve to do my duty and to live honorably, so help me God." Online posting at <<http://www.usafa.af.mil/pa/factsheets/honor.htm>>. An interesting problem with this code is that it is susceptible to a possible regress. Tolerating an honor code violation is itself an honor code violation. But presumably, so is tolerating someone who one knows is tolerating an honor code violations, an so on, and so on.

who obeys the honor code is not necessarily an honorable person. A cadet who shirks duties, is pompous, or is an overzealous careerist engages in dishonorable behavior without violating the honor code. Cadets with these character flaws may eventually serve in the military service and perform their duties competently. These officers will usually receive honorable discharges when separating or resigning from the service, even though they would generally not be considered a role model of good character, of "honor."

In the military context honor is intentionally vague and ambiguous, having a fluid character as both an ideal and a duty. Service personnel who fail to discharge their professional duties dishonor their profession and may be given a dishonorable discharge, or, for less egregious offenses, an 'other than honorable discharge'. This places a permanent blemish on one's record and usually places permanent limitations on one's future career prospects after military service.

As an ideal, honor is more elusive. Exceeding minimum standards brings praise and other perks, but what the minimum standards of honor are depends on one's professional context. For example, the minimum standards of honor for a Navy SEAL are higher than they would be for an enlisted clerk in a personnel office. While both individuals would be expected to uphold their honor by being truthful and trustworthy, the Navy SEAL must be trusted to serve selflessly in the face of lethal dangers that would probably make the personnel clerk turn and run. Honor as an ideal is best inculcated and encouraged through heroic stories, both factual and fictional. These stories perform two functions. They increase understanding of what behaviors honor includes, and they inspire soldiers to emulate those qualities when they perform their duties. Even though honor may be difficult to define, people recognize honorable behavior when they see it.⁹⁹

⁹⁹ A quick example to illustrate honorable behavior is from the 1953 movie *Titanic*, released by 20th Century Fox. In this movie, and when the ship is sinking, the band members continue to play music to lift the spirits of the passengers, even though it is clear that they are all going to die. At first the band plays jazzy music. Later at death approaches, the band switches to hymns. Clearly the band members are behaving honorably in this situation, thinking about other people rather than themselves.

Some breaches of honor are synonymous with violating rules and others only with missed opportunity to excel. Deceitfulness is dishonorable behavior. Not stopping to help someone change a flat tire may be dishonorable behavior too, even though no moral rules may have been violated in a particular instance. The first violation of honor is usually immoral; the second violation is normally only calloused. This interpretative latitude serves an important purpose in the American professional military ethic. Keeping the content of honor vague facilitates experimentation, thought, spontaneity, and maintains intellectual vitality.¹⁰⁰

Some writers have argued that honor is the integrating characteristic of military character. On this view, honor gives meaning to the other desirable character traits of military professionals.¹⁰¹

Warrior ethos

The ideal of the warrior ethos also receives significant attention as a central theme in the literature of evaluation and aspiration. In the 1989 monograph, *Warfighting*, the U.S. Marine Corps derives the warrior ethos from the nature of war itself. "War is ultimately an art, an act of human creativity and intuition powered by strength of the human will". War requires "intelligent leaders with a penchant for boldness. It is each Marine's duty to take the initiative as the situation demands".¹⁰² Good soldiers are warriors and warriors have certain characteristics. Besides functional competence, soldiers who are warriors necessarily have determination, esprit de corps, self-confidence, honesty, frankness, candor, physical courage, moral courage, trust, and

¹⁰⁰ Geoffrey Best, *Honour Among Men and Nations: Transformations of an Idea*, Toronto: Toronto University Press, 1982, p 9; and Donald Zoll, "The Moral Dimension of War and the Military Ethic," *Parameters* vol. 12, June 1982, p 4-8, reprinted in *The Parameters of Military Ethics*, edited by Lloyd Matthews and Dale Brown, Washington: Pergamon-Brassey, 1989, p 116-117.

¹⁰¹ Best, op. cit., p 20; Gabriel, op. cit., p 157; Hartle, op. cit., p 47-49; Janowitz, op. cit., p 225; Melville A. Drisko, *An Analysis of Professional Military Ethics: Their Importance, Development and Inculcation*, Carlisle Barracks, PA: U.S. Army War College, 1977, p 4.

¹⁰² U.S. Marine Corps, *Warfighting*, (MCDP 1), Washington: U.S. Marine Corps 20 June 1997, p 15 and 45.

judgment. Although intangible and hard to measure, the warrior ethos adds a significant and sometimes decisive component of total combat power that a military force can use against the enemy. It is a "force multiplier."¹⁰³

The warrior ethos stresses leadership over careerism, motivation over number crunching, and character over managerial techniques. The best football coaches lead players to accomplish a mission as a team; they do not waste valuable time juggling practice schedules and writing letters. The best military leaders lead soldiers to accomplish a mission as a team; they do not waste valuable time developing spread sheets and changing filing systems. While leaders do some of these activities at times, the best leaders subsume management under leadership. For the warrior, leadership is the focus of command, not the administrative details that support it.

Systematic Literature

To criticize American professional military ethics is analogous to criticizing a subject as broad as epistemology. The literature takes diverse philosophical perspectives on specific issues depending on the views of the authors. Each American professional military ethics article or book can be criticized on its own merits for logical consistency, soundness, clarity, rigor, and whether it captures our firm intuitions about concrete cases. Thus, there is no dominant theoretical justification behind the literature of evaluation and aspiration.¹⁰⁴ Consequentialism, virtue theory, social contract theories, and deontological theories are all used to logically ground American professional military ethics. Despite these theoretical differences, there is broad agreement in many areas and isolated disagreement about conclusions in specific cases.

¹⁰³ Lawrence Garrett, A.M. Gray, and Frank Kelso, "The Way Ahead," *Proceedings*, U.S. Naval Institute, April 1991, p 44; Gabriel, op. cit., p 28; U.S. Army Infantry Center, *The Willingness to Sacrifice*, Ft Benning GA: Ft. Benning PO, p 4; and Nye op. cit., 79-97.

¹⁰⁴ I say this because American military ethical debate seems to not be governed by one contemporary theory that is steering the dialog as, e.g., Rawls has had on normative ethical debate since the early 1970s. Historical events such as the Vietnam conflict, and technological advances such as nuclear weapons more often generate moral dialog in the military.

In what follows I will discuss four contemporary and influential writers of American professional military ethics. These authors are Fotion and Elfstrom, Axinn, Gabriel, and Hartle. These four authors systematically and philosophically ground military ethics in a particular ethical theory. Fotion and Elfstrom take a consequentialist position. Axinn grounds military ethics in Kantian deontology. Gabriel grounds military ethics in virtue theory. Finally, Hartle takes an implicit social contract position, basing his systematic military ethics on the traditions and customs of American society and the U.S. Constitution.

Fotion and Elfstrom's consequentialism and American professional military ethics

Consequentialism has historically furnished argumentative justification for many military actions, some of them morally dubious. Consequentialist arguments have been given to justify the decision to use the atomic bomb on Japan. It has been argued that dropping the bomb saved thousands more American and Japanese lives than the alternative, an invasion of the Japanese mainland using conventional weapons. This argument misuses consequentialism because it creates a false dilemma by refusing to compromise on the demand for unconditional surrender. There were more alternatives available to President Truman than nuclear attack or mass invasion and conquest. To cite a more contemporary example, consequential justifications may justify American government personnel using all means necessary to interrogate detained terrorists. This position argues for selectively violating human rights. If violating the rights of terrorist prisoners gains information that stops a terrorist attack that will maim and kill thousands of innocent "American" civilians, then the torture is justifiable.

In their book, *Military Ethics: Guidelines for Peace and War*, Fotion and Elfstrom argue that consequentialism provides the best theoretical justification for military ethics. Fotion and Elfstrom declare their consequentialism when they state,

Like all works of applied moral philosophy, ours is based on a general moral theory: viz., utilitarianism.... The very fact that utilitarianism is the position being constantly attacked

indicates its continuing power.... Our particular stance is an adaptation of the utilitarianism developed by the contemporary British philosopher R.M. Hare....¹⁰⁵

Fotion and Elfstrom argue for subjecting the rules prescribed by the conventions of international law to a higher utilitarian standard in order to make it possible to assess possible exceptions to the rules in specific cases.

The use of poison gas in warfare cannot be ruled out *a priori* as abominable or repugnant. It is important to attempt to understand what is right or wrong about using such weapons—and perhaps to acknowledge that under certain circumstances their use in war may be justified.¹⁰⁶

Fotion and Elfstrom criticize a few theoretical alternatives to a consequentialist grounded military ethic and then defend a consequentialist foundation. Their analysis categorizes military ethics during peacetime, diplomacy and mobilization, actual hostilities, and post war peace. For Fotion and Elfstrom, consequentialism provides the best theoretical grounding for military ethics for the following reasons.

First, consequentialism provides a decision procedure for adjudicating between rights when they are in conflict in concrete military cases. Consequentialism, subsumes conflicting rights under considerations of outcomes. When rights conflict, as they often do in military engagements, maximizing the good takes priority, however 'good' gets cashed out. For Fotion and Elfstrom, while decisions based on maximizing the good may be counterintuitive in a few cases, it does at least provide a plausible and consistent decision procedure to apply in complex cases.

Secondly, Fotion and Elfstrom argue that consequentialism is uniquely suited to military decision making because outcomes take priority over rights. Consequentialism does not hold that some irreducible minimal amount of primary goods is owed to all individuals in virtue of their status as human beings. This conclusion is important in war, where situations frequently arise

¹⁰⁵ Fotion, op. cit., p 1.

¹⁰⁶ Fotion, op. cit., p 22.

where it is necessary to deny even a "minimal amount" of primary goods to some human beings. Just joining the U.S. military requires surrendering an unequivocal right to life. For Fotion and Elfstrom, this is not a problem for consequentialism, since values like rights are contingent on their contribution to maximizing the good. Thus, for consequentialism, rights may be sacrificed in particular military ethics cases without contradicting the fundamental principles on which the American professional military ethic is based.

Third, consequentialism provides the best theoretical grounding for difficult military decisions because consequentialism accepts that life is not necessarily fair and it does not view fairness as the ultimate goal of moral judgments. To Fotion and Elfstrom, a theory that accepts that life is not nor should it always be fair better preserves the context-dependent character of moral decisions. In the military profession, many moral decisions are necessary that are not fair. Even in just wars moral decisions in concrete cases are necessary and appropriate that inevitably violate individual rights.¹⁰⁷ To Fotion and Elfstrom, if consequentialism grounds military ethics, then moral decisions in some cases can both violate individual rights and be morally justifiable.¹⁰⁸

Next, Fotion and Elfstrom argue that consequentialism provides the tools to more effectively manage conflicts caused by the different plans of life that people choose. These plans include corporate plans that define people as part of a national community, and social plans that concern many goods other than basic individual rights. Consequentialist moral decision-making acknowledges that people want the liberty to sacrifice basic individual rights for higher community, corporate, and national goals. Also, consequentialist decision-making is based on

¹⁰⁷ This argument may be expanded to include the broader issue of the military institution as a whole. It is arguable that the existence of a successful military institution necessarily depends on the government's ability to take fundamental human rights away from soldiers, e.g., life and privacy. A military service cannot function unless its members surrender, with certain restrictions, fundamental rights to the state. It is another issue whether this argument shows that rights are merely gifts of the states and may be taken by them at anytime they deem it necessary for, e.g., national security.

¹⁰⁸ Consequentialists have the opposite problem. Their problem is in making fast and reliable calculations that render the correct moral judgment intelligible according to the consequential standard. This problem has spawned a thought experiment industry in moral philosophy.

what most moral agents already know, i.e., that in some situations such as war, morality requires that things like individual rights and fairness may have to be sacrificed in some situations to do what is right. This knowledge is obvious in the military profession, where citizens are often willing and eager to serve their country even though they must give up individual rights to do so.

Fotion and Elfstrom adopt the consequentialism of Hare as the best consequentialist grounding for military ethics. They argue that Hare's two levels of moral thinking, the *intuitive* and the *critical*, provide a plausible description of common morality, describing how moral thought and moral decisions actually take place.¹⁰⁹ Fotion and Elfstrom think that Hare's consequentialism should be used to guide moral education and training in the military profession.

Hare's intuitive level is unreflective. It is based on general moral rules that are conditioned into people from their society, family, school, church, and friends. To Fotion and Elfstrom, intuitive thinking suits professional military ethics because the military environment requires near automatic obedience, a sense of urgency, fast action, and many unreflective rules. Soldiers are frequently under extreme restrictions of time, resources, institutional pressures, and duress. Moral decisions are necessarily urgent and reactive responses to rapidly changing situational conditions within the fog and friction of war.¹¹⁰ Soldiers' goals and the means to attain those goals are generally predetermined. This context explains why military training is hard and military life is governed by many rules. Soldiers must act unreflectively and with discipline to maximize the odds of overcoming the natural inclination to panic and run.¹¹¹ Thus, *prima facie*, critical thinking and the battlefield do not mix well. Critical thinking must be

¹⁰⁹ See R.M. Hare, *Moral Thinking: Its Method, Levels, and Point*, Oxford: Clarendon Press, 1981, for a discussion the two levels of moral thinking that Fotion and Elfstrom appropriate for their systematic military ethics.

¹¹⁰ Carl von Clausewitz, *On War*, new and revised edition with intro and notes by F.N. Maude, trans by J.J. Graham, New York: Barnes and Noble, 1966. In Chapters 6 and 7, Clausewitz discusses the activity of war as beset by "fog" and "friction", "fog" because the soldier has very little information about what is transpiring from a big picture standpoint, and "friction" because events never go as planned.

¹¹¹ Fotion and Elfstrom, op. cit., p 13. Many battles are decided on just the issue of who keeps composure the longest. When the troops panic and break ranks, chaos and defeat result.

accomplished before the battle begins, particularly to anticipate contingencies that will inevitably arise.

For Fotion and Elfstrom, the intuitive level of moral thinking fits well with professional ethics in general since the most professions usually develop codes of ethics to guide their members' moral judgments. Codes of ethics settle general issues in advance by establishing a default position on key matters. Codes of ethics can guide behavior in a crisis and prevent decision paralysis. These codes "save time by keeping us from having to think through what we are supposed to do on every occasion when we are faced with a problem."¹¹²

Although codes of ethics provide moral guidance for making moral judgments in specific professional contexts, Fotion and Elfstrom do not think that codes are moral decision algorithms that prescribe absolute rules. "It is difficult, and very likely impossible, for codes to cover all contingencies without becoming so abstract as to lose their prescriptive character."¹¹³ For Fotion and Elfstrom, while the physician's code of ethics should guide moral judgment, the military codes of ethics should facilitate near automatic responses to problems. To motivate military professionals to obey codes of ethics this unreflectively, Fotion and Elfstrom argue that their content must be memorized. Training in how to use them to make wise decisions must include conditioning and indoctrination. Discussion groups may be held for higher-ranking leaders. And violations must be punishable offenses.¹¹⁴

For Fotion and Elfstrom, the military profession is so large and complex that one code of ethics will not suffice to provide the guidance needed to steer military professionals towards

¹¹² Fotion and Elfstrom, *op. cit.*, p 67.

¹¹³ Fotion and Elfstrom, *op. cit.*, p 75. This is a criticism of theorists who propose sets of universal moral rules. To be universal the rules have to be so general as to almost seem useless, or simply to restate the painfully obvious. This is an issue that Gert has to answer.

¹¹⁴ Paradoxically, unlike the medical profession, persons with lower levels of education, experience, and intelligence are frequently those who must negotiate the most agonizing moral conflicts under torturous conditions. Rigorous training is necessary to make the time honored moral rules of war second nature in the crisis environments of military operations.

maximizing the good. Instead, they propose four separate codes: a creedal code, an internal code, a fighting code, and a prisoner's code.¹¹⁵ In spite of appearances, Fotion and Elfstrom do recognize that a proliferation of codes depletes their moral influence. Their four codes define primary and general group relationships in the military environment. For Fotion and Elfstrom, each group relationship needs a separate code to guide moral decisions between and within those groups. Since codes are tailored to the intuitive level of moral thought, they should be short and simple.

These codes would still need to be kept simple in that each one would likely need to be kept to eight or ten rules with each rule kept as simple as possible. Within that format, the content of the rules would have to be specific enough to have prescriptive power.¹¹⁶

Unfortunately, Fotion and Elfstrom do not actually propose succinctly written content for their four codes; they only recommend four types. Their *creedal code* would be analogous to a preamble that mentions general principles, qualities, or core values in the form of a slogan or motto.¹¹⁷ An *internal code* would govern intra service relationships. These rules would state the general duties American military professionals owe each other like obeying orders, being fair, working hard, doing one's duty, and holding one another accountable to standards of behavior. A *fighting code* would govern relations with the enemy and others outside one's service, and would include a succinct statement of those rules that capture core provisions of the Geneva Convention with respect to treatment of enemy soldiers, noncombatants, sick, wounded, etc.... It would also include general prohibitions against actions such as destroying historic landmarks. Finally, a *prisoners' code* would govern ethical treatment of prisoners of war, particularly on issues like

¹¹⁵ Fotion and Elfstrom, op. cit., p 76-79.

¹¹⁶ Fotion and Elfstrom, op. cit., p 73. All codes of conduct have to be short enough to memorize, simple enough to understand, and substantive enough to be relevant. The fact that Fotion and Elfstrom opt for eight to ten rules shows an interesting affinity with Gert's proposed set of ten universal moral rules. The rules are plenty enough to be rich in content, but few enough to quickly memorize, understand and utilize.

¹¹⁷For example, "Duty, Honor, Country" is the motto of West Point. The U.S. Air Force has a motto, the U.S. Air Force core values of "Integrity First, Service Before Self, and Excellence in all We Do."

torture, surrender, and escape.¹¹⁸ Though Fotion and Elfstrom do not provide content for their codes, the implication is that this content is already written down in other places and needs only to be framed in succinct code form according to these four categories.

Methods for teaching these codes would naturally differ according to environmental conditions and the group receiving the training. Officers, NCOs, and basic trainees would require different types of training since they have different levels of authority to make moral decisions that involve different alternatives. When mobilizing for war or dealing with lower enlisted ranks, it would most likely be necessary to make training consist of simply committing a code to memory while omitting longer discussions involving complex cases where rules conflict and critical thought is required. At other times the training would involve discussions of complex cases, especially for higher-ranking soldiers whose duties required critical thought to make independent moral decisions. This level of training, according to Fotion and Elfstrom, would focus on Hare's second level of moral reasoning.¹¹⁹

Fotion and Elfstrom argue that in the American military, institutional mechanisms are already in place that implicitly confirm Hare's consequentialist dichotomy between intuitive and critical moral thinking. For example, U.S. Army Manual 21-78, titled *Prisoner of War Resistance*, restates the Code of Conduct as an intuitive prisoner's code. However, following the restatement of each article of the code, FM 21-78 provides a critical analysis of how to interpret these rules in practice. Article V states,

When questioned, should I become a prisoner of war, I am required to give name, rank, service number, and date of birth. I will evade answering further questions to the utmost

¹¹⁸ Fotion and Elfstrom, op. cit., p 76-79. Fotion and Elfstrom do not argue for four codes precisely. They are just making a proposal they think works while capturing the complexity of the different relationships that the military profession presents. Too many codes lose potency, but restricting to only one code probably would leave out important material, be exceedingly long, and not take into account differences in rank. For example, Fotion and Elfstrom say that officers and noncommissioned officers (NCOs) would probably write different creedal codes. Officers would make theirs inspirational but leave out specifics; NCOs would want prescriptive rules with no exceptions.

¹¹⁹ Fotion and Elfstrom, op. cit., p 74.

of my ability. I will make no oral or written statement disloyal to my country and its allies or harmful to their cause.¹²⁰

FM 21-78 then gives the following analysis of this article.

When questioned, a prisoner of war is required by the Geneva Conventions, this Code, and is permitted by the UCMJ, to give name, rank, service number, and date of birth. Under the Geneva Conventions, the enemy has no right to try to force a USPW to provide any additional information. However, it is unrealistic to expect a PW to remain confined for years reciting only name, rank, identification number, and date of birth. There are many PW camp situations in which certain types of conversation with the enemy are permitted. For example, a PW is allowed but not required by this Code, the UCMJ, or the Geneva Conventions to fill out a Geneva Conventions 'capture card', to write letters home, and to communicate with captors on matters of health and welfare.¹²¹

FM 21-78 provides over 100 pages of analysis and interpretation of this code in an effort to show a soldier how to reason critically when applying the code's guidelines to moral decisions in the prisoner of war context. FM 21-78 also gives practical guidance on a number of prisoner related issues such as how to carry on clandestine communications with fellow prisoners. For Fotion and Elfstrom, FM 21-78 is one example that illustrates Hare's two levels of moral thinking working coherently together in an official military publication. In FM 21-78, the code provides the content and realistic case discussions provide material for critical analysis.¹²²

One way to criticize FE's military ethics would be to apply cogent scholarly criticisms of Hare's book *Moral Thinking* against Fotion and Elfstrom's military ethics. For example, Gert criticizes Hare by arguing for only one and not two levels of moral thinking. Assuming that Gert's criticism against Hare were effective, it would also presumably be effective against Fotion and Elfstrom.

¹²⁰ FM 21-78, op. cit., p 5-10.

¹²¹ FM 21-78, op. cit., p 5-10.

¹²² Fotion and Elfstrom, op. cit., p 81. FM 21-78 illustrates rules and case analysis working together in an official document. This dynamic is similar to what I see between the descriptive rules in the official documents and the critical analysis of these rules at work in the literature of evaluation and aspiration. FM 21-78 shows importantly that the official documents do not just list rules, policies and procedures, while the academic literature analyses them. FM 21-78 illustrates that, within the services, people are aware of the need to provide some level of analysis to guide critical thought in the field.

Hare argues that critical thought is necessary to resolve conflicts between unreflective rules. For Hare, moral progress is achieved when critical thought causes a new rule to evolve. For Gert, moral progress does not happen this way. There are ten basic moral rules that describe harms that every rational person wants to avoid. When moral rules conflict, each alternative will violate one or more moral rules. Each of these violations of moral rules must be justifiable. For Gert, violations ought to be justified following a procedure that analyzes morally relevant features and assesses whether impartial rational moral agents can publicly allow the proposed violation in that and all relevantly similar situations. The basic moral rules are universal, simple, and highly general. According to Gert only the applications of universal moral rules change in response to new contextual facts.¹²³

A key criticism of Fotion and Elfstrom that goes through Hare concerns whose preference satisfaction should take precedence when making a moral decision. If rules govern the preference satisfactions that matter and how much they matter, then it seems that Hare is retreating to a deontological position by letting rules govern preference satisfaction assessments and not the other way around. For example, if the preferences of a person like Hitler or Stalin are to be eliminated from consideration, then rules that restrict whose preferences are to count would have to be formulated. In contrast, if preference satisfactions are not restricted with such rules, then they cannot make exceptions when particular people like Hitler and Stalin have evil preferences, in which case Fotion and Elfstrom's views collapse into an act utilitarianism. Act utilitarianism has other well-known problems, such as the impossibility of calculating the actual consequences in particular situations, in the case of Fotion and Elfstrom, of calculating what every involved party's preferences really are. Act consequentialisms also have a well-known problem of producing moral obligations that nearly every moral agent considers counterintuitive or overdemanding.

¹²³ Bernard Gert, *Morality: Its Nature and Justification*, New York: Oxford University Press, 1998, p 237.

In direct response to Fotion and Elfstrom's book, I reject the way they use Hare to begin with. Their position is that Hare's two levels of moral thinking accounts for the complexity of military ethics more effectively than certain rights-based theoretical alternatives because it provides more explanatory power to resolve military ethical conundrums. On this point I admit that they may be correct. Nevertheless, their argument ignores other alternatives that might stand up more effectively to Hare's. Fotion and Elfstrom completely ignore both virtue ethics and Gert's common morality as plausible alternatives that may handle moral complexity in the military profession equally well or better than an application of Hare's view does.

In closing, I offer two additional criticisms of Fotion and Elfstrom's consequentialist military ethics. Their views contradict the official documents governing the United States military. The American professional military ethic requires loyalty to documents, including international treaties and conventions, which prioritize rights over results, regardless of what the majority of people would prefer. These documents include the Geneva Conventions, which exclude exceptions to laws of war for consequential reasons. Even the principles of military necessity and proportionality, the most results-oriented principles in the Geneva Convention, are more restrictive than Fotion and Elfstrom's consequentialism allows. Application of the principle of military necessity does not depend on preference satisfaction assessments, but on considered moral judgments based on many time-honored rules and traditions.¹²⁴ Second, in response to right theories, Fotion and Elfstrom argue that one of the virtues of their view is that it provides a standard for making moral decisions in cases where each alternative would violate some individual rights, effectively admitting the perpetual existence of a dirty hands problem in

¹²⁴ This is only a theoretical point. I do not claim that the signatories to these conventions do not resort to utilitarian reasoning from time to time. That is just false. I only state that the conventions support an overt rights interpretation more clearly than a utilitarian one. Results are important, but they are subsumed under human rights.

military contexts.¹²⁵ However, Fotion and Elfstrom admit that, though their view provides a standard for making moral decisions according to maximizing preference satisfaction, this criterion for making moral decisions can make counterintuitive moral demands on moral agents. In other words, Fotion and Elfstrom seem to be saying that, in order to have a useful moral decision procedure, moral agents have to accept some of the counterintuitive moral obligations that maximizing preference satisfaction puts on moral agents. This conclusion is not necessarily true. Gert's theory of moral rules offers a succinct moral decision procedure that may overcome the perceived need to accept counterintuitive results as an inevitable outcome of having a consistent moral decision procedure.

Axinn's strict deontology and American professional military ethics

The official documents describe many duties that govern professional military conduct. These laws, regulations, policies, and manuals describe professional duties as duties that hold regardless of the consequences. Thus, the rules prescribed in the official documents that, e.g., require paying one's debts, caring for one's dependents, obeying legal orders, and caring for the welfare of subordinates are moral requirements that are not necessarily contingent on the consequences. Military professionals, including officers who make many critically thought out moral decisions, may not make exceptions because they think selective violations will produce better results, i.e., satisfy more peoples' preferences. In combat situations, e.g., international law prohibits executing surrendering prisoners who have made themselves noncombatants, even if a

¹²⁵ To these criticisms, readers may conclude "So what?" My response is that if Fotion and Elfstrom had stated explicitly that they intended their military ethics to replace the moral requirements in the official documents that provide legal and moral guidance for American military professionals, then the question "So what?" would have more force. Fotion and Elfstrom do not explicitly state this goal, and they seem to imply that they are offering a description and justification for military ethics rather than a replacement for it.

fully informed military leaders believe that respecting these prisoners' rights would increase risks to friendly troops and increase the likelihood of mission failure.¹²⁶

Military professionals also cannot ignore institutional rules because it makes other duties easier to perform. These institutional rules clearly do not always produce the best results in each case. Consider a commander who orders his unit to wear a more poorly insulated uniform for a military parade in cold weather. He also orders his troops to wear the shiny plastic shoes that give the troops more blisters. Conscientious commanders consider the preferences and comforts of their troops, but not at the exclusion of other factors, considering everyone attending the parade. The commander's order is legal; it may or may not be the most preference-satisfying alternative. The troops are obligated to obey it.

Writers such as Sidney Axinn argue that military professionals have duties that sometimes override considerations of outcomes. Axinn makes the strong claim that combatants are morally required to assume greater risks, even risk of death, in order to reduce the risks of harm to noncombatants, even if those risks might marginally increase the danger level of soldiers, jeopardize the probability of mission success, and produce better consequences overall.¹²⁷

Axinn is, I think, the best contemporary example of an American professional military ethics scholar who argues for a strict deontological foundation for military ethics. In his book, *A Moral Military*, Axinn argues that the conventions, laws, and treaties that have evolved into the current corpus of international laws of war are imperatives grounded in Kant's moral and political philosophy. The reason Axinn argues for this connection between international law and strict

¹²⁶This is one of my criticisms of Fotion and Elfstrom's position. They would argue that maximizing preference satisfaction might justify executing prisoners in certain cases. If there are exceptions, then their view becomes an act consequentialism grounded in preference satisfaction. Admittedly, this is an issue on which military professionals will probably disagree, the level of disagreement depending on the circumstances of particular cases.

¹²⁷ Axinn makes this point in *A Moral Military*. For example, regarding surrender, Axinn states, "Suppose that some enemy soldiers surrender, but the situation is such that your own safety and that of your patrol will be at great risk unless those prisoners are shot and left. Can they be shot to defend your own security? No.... It would be a war crime to shoot them." See Axinn, op. cit., p 76.

deontology is that he accepts Kant's argument that a primary aim of any war should be the achievement of a stable and lasting peace.¹²⁸

To Axinn, the purpose of the laws of war as expressed in the various conventions and treaties is to limit war's cruelty. Limiting cruelty is crucial if particular wars are to end with a decent chance at producing a stable peace without bitterness or rancor. For Axinn, the laws of war contribute to this goal because they are based on moral principles that respect the dignity of human beings. Kant puts this point well. "It is forbidden to employ any such treacherous measures as would destroy the mutual faith that is required if any enduring peace is to be established in the future."¹²⁹ Note the similarity of Kant's words to the U.S. Army's language in Field Manual 27-10. "Treacherous or perfidious conduct in war is forbidden because it destroys the basis for a restoration of peace short of the complete annihilation of one belligerent by the other."¹³⁰

Axinn argues that the defining virtue of the good soldier is respect for the absolute dignity of human beings to the point of being willing to make the ultimate sacrifice to preserve that dignity. He says that a good soldier is an "...individual who agrees to sacrifice his or her own life, if necessary, for the welfare of others."¹³¹ Good soldiers are especially willing to sacrifice for those defenseless groups that the Geneva Conventions protect such as wounded, sick, shipwrecked, prisoners, and other innocent persons. Good soldiers are those who confront moral

¹²⁸ Kant held the view that until a strong world government was put in place to enforce "perpetual peace" that war would continue to occur. Kant and Axinn are not the only writers to support this position. Mortimer Adler argues this very point in *How to Think About War and Peace*, New York: Simon and Schuster, 1944. Evidence of a failure to steer war toward a lasting peace may be found in the example of the Treaty of Versailles. A harshly punitive treaty, the Germans chafed at how it handcuffed them militarily, economically, and territorially. WWII was, in part, caused by collective German bitterness over its restrictions.

¹²⁹ Immanuel Kant, *The Metaphysical Elements of Justice*, trans. John Ladd. Indianapolis: Bobbs-Merrill, 1965, p 347.

¹³⁰ FM 27-10, op. cit., p 22.

¹³¹ Here Axinn shares an emphasis on the "ultimate liability" clause that gets discussed in Wakin and Hackett's work, and which is also mentioned in the enlisted contract of service.

decisions in military contexts with a strong commitment to absolute rules that respect the dignity of human beings.

To Axinn, the restrictions in the laws of war protecting the defenseless also protect soldiers by making certain methods of fighting illegal. These laws are moral rules that respect the absolute dignity of all persons, including enemy soldiers. When military professionals obey these moral rules regardless of the consequences, as they should, then lasting values are produced and sustained in the culture and on the planet. These values contribute to a more stable and lasting peace.

Axinn strongly claims that the good soldier's sacrifices made in respect of human dignity requires no reciprocity. A sacrifice that demands reciprocity is not a sacrifice but an expedient. Good soldiers preserve human dignity by obeying the laws of war regardless of the enemy's response. Such dedication to principle is instrumental to winning the peace. Axinn eschews reprisals and other exceptions to moral rules, because, like Kant, he thinks the duty to respect human dignity is absolute. Hence, the commando unit, given the option of killing a few surrendering soldiers to improve its chances for mission success, has an absolute duty to resist this temptation, regardless of the costs. For Axinn, obeying the rules promotes values that endure, values that transcend consequences.

A natural view to take on the laws of war as now codified is that they are positive laws that merely codify and systematize implicit rules of warfare that have been a part of common law and tradition for centuries. International peer pressure is even more significant with the laws of war codified.¹³² Thus, their expression as positive law, which began to develop in the last century through documents like the *Leiber Rules*, has been a good recent development. However, to Axinn the laws of war are more than codified rules based on human traditions and common law. To him, the laws of war are actually codified expressions of natural laws. If the laws of war were

¹³² Axinn argues, Flowers does, that the *Leiber Rules* are based on Kant's political philosophy.

not codified in international law or supported by common law and tradition, then they would still be morally binding.

Axinn broaches the criticism that soldiers' absolute duty to sacrifice for the sake of laws and principles that respect the dignity of human beings requires commanders to value the rights of their own troops less than those of enemy troops and noncombatants. To Axinn this absolute duty only requires commanders to value their duties to the laws of war over and above expediency or results. It does not necessitate depreciating the value of one's forces. When the duty to obey a commanding officer and the laws of war conflict, Axinn says the law should override commander orders.¹³³

When military professionals make moral decisions in tense wartime situations, there is sometimes moral disagreement about how to interpret these absolute rules and make a decision when they conflict in a particular situation. Axinn proposes using Kant's version of the publicity test to adjudicate these disagreements. Kant's publicity test is two pronged. First, Kant says that a proposed action is immoral if "it cannot be openly divulged without at the same time defeating my own intention, i.e., must be kept secret for it to succeed, or if I cannot publicly acknowledge it without thereby inevitably arousing everyone's opposition.... All actions that affect the rights of other men are wrong if their maxim is not consistent with publicity".¹³⁴ Second, Kant requires that, "All maxims that require publicity (in order not to fail of their end) agree with both politics and morality".¹³⁵ Actions that pass both tests are morally acceptable. To translate what Kant

¹³³ Axinn, op. cit., p 166. I agree in principle that the laws of war generally trump commander orders. If a soldier is ordered, in violation of the Geneva Convention, to bomb a civilian hospital, it is reasonable to question that order vigorously. However, I am not convinced he effectively shows that commanders are not obligated to value their own less than these other considerations. If the only way to save one's troops is to kill enemy troops in violation of the rules, then it seem clear that Axinn thinks a commander should sacrifice his troops to principle. This is a counterintuitive position.

¹³⁴ Immanuel Kant, *Perpetual Peace and other Essays*, translated and with introduction by Ted Humphreys, Indianapolis: Hackett Publishing, 1983, {381}. Numbers in brackets indicate the Berlin edition page numbers.

¹³⁵ Kant, *Perpetual Peace and other Essays*, op. cit., {386}.

says into current language, if my action must be kept secret in order to succeed, then it is inconsistent with publicity. Second, the action in question should depend on a rule or law that requires publicity in order to be effective.

Obedying a traffic law is an example of an action that passes both of these tests. Publicizing my intent to stop at red lights does not defeat my intention or generate disagreement. It is also based on a rule that requires publicity for its success. If traffic lights were put up and the public was ignorant of their true purpose, the laws governing their use would not work. These laws depend on the fact that everyone driving a car knows what these lights are for. Publicity not only does not make this traffic law contradict its intended end; it requires publicity to work effectively. In contrast, cheating is an action that clearly violates both of Kant's publicity tests. Cheating requires secrecy and it clearly does not require publicity to successfully work.

For Axinn, since the laws of war reflect natural laws that respect human dignity, and because obedience to these laws is instrumental to fostering a stable future peace, then they should be vigorously taught to military professionals. Vigorous teaching and training disposes soldiers to obey the rules and to make better moral judgments when the rules conflict. This includes comprehensive testing. Failure to vigorously teach these rules will inevitably cause an increase in war crimes. Political leaders should require and institutionalize the teaching of the laws of war to ordinary citizens too. Informed citizens will more likely hold their governments responsible for war crimes they commit and deter some violations. Axinn does not propose a method for implementing these curricula.

I offer the following criticisms of Axinn's view. The first I call the 'psychological criticism'. Military leaders have known for centuries that most soldiers are not motivated to sacrifice selflessly for the sake of principle alone. There are rare exceptions. Yet, this seems to be exactly what Axinn's military ethics requires of everyone. Disciplined combat units that fight well are taught to obey many moral and instrumental rules. United States soldiers are taught to be

patriotic and to believe that U.S. constitutional principles are worth defending. However, in extremely hazardous contexts, soldiers, policemen, firemen, etc... fight to protect each other, their comrades and friends. Human beings are most universally motivated to sacrifice selflessly for significant other *people* such as family, friends, and colleagues. This sacrifice may include defending one's homeland and way of life from aggression. Axinn's military ethics ignores this psychological dimension of human sacrifice, or reduces it to motivations that have no moral worth. I think this criticism of Axinn is forceful and decisive. Even if we grant theoretically that military professionals have an unlimited liability to preserve values that respect human dignity, in practice these principles do not consistently motivate sacrificial service, nor are they necessarily the only motivations that have moral worth. If sacrifice for the sake of absolute principles is the only acceptable moral motivation for military service, then Axinn has a skewed view of human nature and the common moral system that is derived from it. If sacrificing to prevent harm to self, comrades, family, and friends has no moral worth, then much of the training of military professionals that relies on these facts about human motivations reduce to conditioning of animals to fight for reasons unconnected to morality.¹³⁶

Secondly, when Axinn argues that the Geneva and Hague Conventions are positive law descriptions of Kantian moral rules, I criticize him for making too strong a claim. These conventions do not necessarily command absolute obedience. It is possible that a situation could occur where two of these laws of war were in conflict, requiring a violation of one of its prescriptions. For example, what if the requirement to care for prisoners of war required diverting much needed food and fresh water from an impoverished community in enemy territory? In this case, which noncombatants should be made to suffer? Should each be made to suffer some, or should some be made to suffer complete deprivation?

¹³⁶ There are rare exceptions to this human tendency. Some persons like Mohandas Ghandi will sacrifice even life itself for the sake of principle alone.

Axinn's theory does not have the conceptual tools to manage these sorts of problems. Axinn does not provide a decision procedure for weighing alternatives when rules are in conflict and it is impossible not to violate one or more of them. In situations where two or more laws of war (that both respect human dignity) are in conflict, which duty is the absolute duty? An exception has to be made for one of these options, something Axinn, it seems, would rather not address. Axinn also gives no method for assessing the justifiability of proposed exceptions to these laws/rules. In the course of hostilities, provisions of the Geneva and Hague Conventions are violated for many reasons, many of them bad. These provisions can also be violated for justifiable reasons. Gert's view has an explanation and a methodology for these conflicts and how to resolve them.

I agree with Axinn that the laws of war codified in the Geneva and Hague Conventions do much to protect human dignity. I even agree with him that there is an indirect connection between these provisions and Kant's theory by way of the *Lieber Rules*. But the connection is looser than Axinn holds. Axinn reaches too far in arguing that, since there is a connection between the laws of war and Kant's moral theory, that the laws of war prescribe an absolute duty to respect human dignity. It is arguable that human beings' right to be treated with dignity is contingent on behavior that earns that respect. For example, murderers forfeit their right to liberty, in some cases their right to life, when they commit murder, are caught and convicted. Murderers forfeit their right to be treated with dignity. If this is true, then analogously, it seems reasonable that some reprisals in war would be morally justifiable if the enemy nation were guilty of egregious violations of laws of war against one's own people. If individuals can forfeit rights through bad behavior, enemy soldiers and even whole nations can do the same.¹³⁷

¹³⁷ Axinn may be misinterpreting Kant on this point. For Kant, rational moral agents can forfeit their rights by bad behavior. Nations can do the same presumably. However, if a reprisal were justifiable because of an enemy's bad behavior, then the rules would still prohibit certain more heinous types of reprisals when other more humane and equally effective reprisals are possible.

Thirdly, Axinn's strong Kantian view implies that the laws of war are complete. It seems more obvious that they are not. Laws, including the laws of war, are periodically revised; some principles stand the test of time and others do not. The Geneva and Hague Conventions have been modified and will be modified again. To give one probable example, once certain chemical agents are produced that only cause temporary paralysis or induce sleep without causing painful death and/or permanent disability, then the convention on the use of chemical weapons will either change or appear absurd.¹³⁸ Although it is difficult to disagree in principle with Axinn's position that the laws of war support and preserve human dignity, most rational persons understand that there are exceptions to this fundamental principle in certain circumstances.

Lastly I criticize a point Axinn makes, but one which I did not discuss in my gloss of his position. Axinn says that covert operations are always dishonorable because they are secret operations and thus fail Kant's publicity tests. To be consistent it seems that Axinn has to hold this view.¹³⁹ In contrast, I would argue that covert operations are justifiable because they sometimes prevent harms that cannot be prevented any other way. A covert operation may accomplish with much less destruction and loss of life what could publicly only be accomplished with a messy and powerful bomb. Axinn does not account for the fact that nations tacitly and publicly agree to engage in covert operations. Interestingly, the conventions are conspicuously silent on the subject.¹⁴⁰

¹³⁸ It would be absurd for the Geneva and Hague Conventions to permit behavior that is crueler, painful and disabling than behavior it prohibits.

¹³⁹ Axinn, *op. cit.*, p 158.

¹⁴⁰ Covert operations are to statecraft and military operations what fouls are in the game of basketball or bluffing is to poker. Committing fouls breaks the rules of the game of basketball, and players are only allowed so many before they are disqualified. Some fouls are more egregious than others. However, every basketball player knows how to use fouls intentionally at strategic moments of games for a variety of reasons. It is part of the game of basketball the way covert operations are part of statecraft. The players implicitly know it. Bluffing in poker attempts to deceive other players as to the true status of one's hand. While deception is wrong generally, in the context of poker it is a conventionally accepted part of the game.

Gabriel's virtue theory and American professional military ethics

The official documents and the literature of evaluation and aspiration discuss the importance of military virtues to American professional military ethics. Scholars who think that the virtues are fundamental stress the need for military professionals to possess qualities like courage, honor, integrity, selflessness, candor, discipline, resolve, tenacity, and initiative. Virtue theorists treat each moral judgment as unique and context dependent. For them, the best way to make professional soldiers is not to teach them lists of rules that always have exceptions, but to inculcate the virtues through education, training, and mentorship. Virtuous soldiers tend to make good moral judgments and follow professional rules more often, and they are more inclined to enjoy doing so. Some scholars like Wakin argue that certain military virtues are functionally necessary for the military profession.¹⁴¹ If Wakin is correct, then inculcating into soldiers those virtues that contribute the most to military success is necessary to ensure mission accomplishment. Thus, educating in these virtues should be a primary focus of American professional military ethics. It is true that soldiers who are virtuous are generally competent and motivated to excel. But is functional excellence the only criteria of value when selecting virtues to emphasize in military training? Or do all the virtues contribute, at least in some indirect way, to mission success?

Virtue theorists are more inclined to use heroic stories and actual historical examples of the virtues being demonstrated in order to motivate soldiers to behave similarly. These stories and historical examples are influential because they motivate soldiers to serve for reasons other than fear of punishment. Obeying moral rules only from fear of punishment does not motivate soldiers to act heroically or even to simply exceed the minimum standards. It also does not motivate people to behave morally when no one else is looking.¹⁴² Lerner argues that the virtues

¹⁴¹ Wakin, "The Ethics of Leadership I," *op. cit.*, p 181-200.

¹⁴² In Wakin, "The Ethics of Leadership II," *op. cit.*, p 200-216, the author innovatively argues that a developmental, Aristotelian approach to leadership inspires more loyalty and gets better results than the

are a necessary prerequisite for military professionals to internalize the military profession as a special higher calling of service.¹⁴³

One influential contemporary scholar who *systematically* defends a virtue theoretical foundation for American professional military ethics is Richard Gabriel in his *To Serve with Honor: A Treatise on Military Ethics and the Way of the Soldier*.¹⁴⁴ Gabriel's book diagnoses several sources of moral degeneration that he argues have infected the American military profession in the last few decades before his book was written. These sources are the Vietnam conflict, publicized military academy scandals, the shift to an all-volunteer force, pervasive moral relativism, excessive concern for public relations, a zero defects mentality imported from corporate America, impersonal centralization of promotions, a tendency towards civilianization and technical specialization, and rampant institutionalized careerism.¹⁴⁵ In response to this moral degeneration, Gabriel calls for a moral renaissance within the military profession. He proposes a virtue theoretical remedy. For Gabriel this moral renaissance is crucial because "...the effectiveness and success of a military force rests far more on the moral quality of its officers and men than it does on technical expertise".¹⁴⁶

For Gabriel, moral obligations are derived from facts about human nature and human social roles. While some moral obligations pertain to relationships between human beings *qua* human beings, others pertain to relationship between human beings *qua* fillers of social roles such as soldiers and doctors. For Gabriel, both sets of obligations are germane to the military

more authoritarian, Hobbsian view of leadership. Wakin credits a Hobbsian "transactional" view of military leadership with generating the corrosive and innovation-stifling "zero defects" mentality in the ranks.

¹⁴³ See Max Lerner's, "The Shame of the Professions," in Wakin, op. cit., p 138. Lerner makes a virtue theoretical argument to defend the need to treat the military profession as a "higher calling."

¹⁴⁴ Gabriel, op. cit.

¹⁴⁵ Gabriel, op. cit., p 3-7, 10-11.

¹⁴⁶ Gabriel, op. cit., p 7.

profession, but the functional virtues of the profession are fundamentally connected to the relationships that pertain to the military professional's social role.

Gabriel wants to emphasize the military virtues in the profession's moral education and training programs, stressing the role that character development plays in producing military professionals who do their duty willingly, habitually, and enthusiastically. To facilitate this renaissance, Gabriel proposes that a virtue-oriented code of ethics be written to serve as the focus of character development of both new recruits and existing veterans. This code would provide succinct guiding principles. The purpose of such a code, Gabriel says, "is to establish points of reference that can be used for the soldier's character development."¹⁴⁷ Gabriel's code consists of ten provisions that emphasize military virtues such as honor, integrity, fairness, and loyalty. His code is stated as follows.

1. The nature of command and military service is a moral charge that places each soldier at the center of unavoidable ethical responsibility.
2. A soldier's sense of ethical integrity is at the center of his effectiveness as a soldier and a leader. Violating one's ethical sense of honor is never justified even at the cost of one's career.
3. Every soldier holds a special position of trust and responsibility. No soldier will ever violate that trust or avoid his responsibility by any of his actions, no matter the personal cost.
4. In faithfully executing the lawful orders of his superiors, a soldier's loyalty is to the welfare of his men and mission. While striving to carry out his mission, he will never allow his men to be misused in any way.
5. A soldier will never require his men to endure hardships or suffer dangers to which he is unwilling to expose himself. Every soldier must openly share the burden of risk and sacrifice to which his fellow soldiers are exposed.
6. A soldier is first and foremost a leader of men. He must lead his men by example and personal actions; he must always set the standard for personal bravery, courage, and leadership.

¹⁴⁷ Gabriel, *op. cit.*, p 50. This short quote nails down the organizing principle of Gabriel's book. A code of ethics in the military should be viewed as a tool, a compass to guide to focus the direction of character development training in the military. The goal of this training is to acquire the military virtues.

7. A soldier will never execute an order he regards to be morally wrong, and he will report all such orders, policies, or actions of which he is aware to appropriate authorities.
8. No Soldier will ever willfully conceal any act of his superiors, subordinates, or peers that violates his sense of ethics. A soldier cannot avoid ethical judgments and must assume responsibility for them.
9. No soldier will punish, allow the punishment of, or in any way harm or discriminate against a subordinate or peer for telling the truth about any matter.
10. All soldiers are responsible for the actions of their comrades in arms. The unethical and dishonorable acts of one diminish us all. The honor of the military profession and military service is maintained by the acts of its members, and these actions must be above reproach.¹⁴⁸

Gabriel argues that the United States still lacks (or has avoided) implementing a code of professional military ethics for cultural reasons.

The military's inability to develop a code of professional ethics is not very surprising in the context of American social values. The major values that have shaped so much of American society work against the development of any ethical codes that serve community as against individual interests. The magnitude of the difficulty is, therefore, apparent in developing professional military ethics. The basic values and operating assumptions of American society in its economic, social, and political development have made it all but impossible to develop notions of community service that transcend individual self-interest.¹⁴⁹

Scholar and retired General Maxwell Taylor, former Superintendent of West Point and former Commander of United Nations Command in Korea, concurs with Gabriel's view that a code of ethics for the American military profession is an idea whose time may have come.

There may be justification, or even a definite need, to restate in strong and clear terms those principles of conduct which retain an unchallengeable relevance to the necessity of

¹⁴⁸ Gabriel, *op. cit.*, p 50. Provision 10 is particularly problematic for Gabriel to defend, even from a virtue theoretical perspective. Provision 10 says, "All soldiers are responsible for the actions of their comrades in arms." This is an absurd statement, or it is couched in some tacit mysticism that makes little sense as a guiding principle for American military professionals. As an Air Force officer, I am not morally responsible, e.g., for the immoral behavior of a U.S. Marine currently stationed in South Korea. An argument can be made that this marine's behavior diminishes the American military profession in both reputation and perhaps even mission effectiveness. But I am not morally responsible for his immoral actions.

¹⁴⁹ Gabriel, *op. cit.*, p 15. The author overreaches here. Perhaps the claim was justified in 1982 when this book was written. In recent years, many codes of ethics have been developed in business and the professions in an effort to professionalize. i.e., supplement various occupations with added moral awareness and responsibility.

the military profession and to which the officer corps will be expected to conform regardless of behavioral practices elsewhere.¹⁵⁰

To Taylor, a code of ethics for the military would unify the profession, specify the cost of membership, set civilian expectations for the military, and attract a certain type of person who is drawn to this sort of group.¹⁵¹

One criticism I offer against Gabriel is that he gives little practical advice for making moral decisions in concrete cases. He just argues that the military virtues need to be codified, taught, and enforced in order to produce a much-needed renaissance of emphasis on moral character in American professional military ethics. The presumption Gabriel makes is that morally virtuous soldiers *will* make good moral decisions in concrete situations.

To Gabriel's credit he does not argue that emulating some idealized role model or paragon of military virtue is needed for developing a soldier's character. That view falls prey to the criticism that there are no ideal role models or paragons of military virtue. Since everyone is fallible, whom should the soldier emulate? I think that, for Gabriel, the code of ethics replaces the moral exemplar as the object of emulation.¹⁵² This seems preferable and more defensible. Gabriel does not address weaknesses that virtue theory has for guiding moral decision making in complex and controversial cases. People in crisis situations can lack both confidence and relevant role models. A concise moral decision guide that is memorized and understood can be a useful, effective, and comforting to military professionals in a way that training in the virtues is not.

¹⁵⁰ Maxwell Taylor, "A Professional Ethic," *Army*, May 1978: p 18.

¹⁵¹ Taylor, *op. cit.*

¹⁵² Taylor, *op. cit.*, p 212. Gabriel provides good empirical evidence here to show the positive impact codes can have on behavior. During the Vietnam conflict, prisoners of war were positive examples of resistance, esprit de corps, and tenacity as compared to American prisoners of war during the Korean conflict. Here American prisoners fared poorly. Gabriel credits this improvement to the military institution's success teaching the Code of Conduct to soldiers, that it gave prisoners a moral compass and renewed their view that American values were worth defending. This is not proof and Gabriel knows this fact, but it does imply that the codes were efficacious.

Gabriel does not totally omit discussing practical moral training in his book. His program calls for providing the most sophisticated training to officers, followed in descending order by NCOs and the lowest enlisted ranks. In this regard Gabriel's view is similar to Fotion and Elfstrom's view. This graduated sophistication of training is *prima facie* reasonable considering the roles that each rank fills, that is until Gabriel presents his proposal. Gabriel's program calls for military ethics to be taught in four sequential courses in the following order: one course in the history of ethical thought, a course in logical argumentation, a course in military ethics, and a course in moral dialectics/casuistry. The only practical way to implement this proposal given how officer training is currently institutionalized would be through the military academies. However, over 50% of officer training occurs in Reserve Officer Training Corp detachments on university campuses; roughly another 25% are trained at the four Officer Training Schools in intense 90-120 day training crucibles. It would be impossible for Gabriel's program to reach more than approximately one in five officers the level of intensity and detail he proposes. To implement Gabriel's program through all of officer training sources, cadets would get much briefer instruction in their few military arts and sciences courses in addition to whatever humanities they take on campus that address these issue. Officer candidates from the officer training schools would only get a day or two's exposure and perhaps be tested on memorization of Gabriel's code. This method would not be substantively different than the instruction the lower ranks would get and would not instill the virtue-centered decision making prowess he wants.

Another criticism of Gabriel applies to any professional ethics that emphasizes the virtues as foundational. Virtue ethics must be clear about what ends are acceptable; otherwise, virtues, no matter how noble, may be effective instruments for evil. Gabriel is not clear about what ends are acceptable; thus, it seems that acceptable ends are those that the leaders give you. He tacitly assumes that American goals as prescribed by its civilian authorities are good by default.

However, virtues are a useful tool to achieve just about any goals, particularly goals that require a group effort. Many Nazi soldiers, such as Erwin Rommell, demonstrated many of the military virtues in their behavior, e.g., loyalty, obedience, resoluteness, commitment, competence, candor, and courage, yet these virtues were used in the service of brutal totalitarianism. That virtue can serve bad ends shows that while virtues may be functionally necessary for a military profession to serve good ends successfully, they are not, as Gabriel implies, sufficient alone to ensure the military profession will serve good ends successfully. The subject of what ends to serve is a very complex issue since the military's function is to serve its client society, at least in societies with civilian control of the military. However, assuming the civilian government is reasonably good, i.e., respects basic rights, has a viable system of law, and respects property rights, the military virtues are more likely to serve as instruments for attaining acceptable goals, eschewing campaigns of mere aggression and conquest.¹⁵³

Since military virtues can contribute to the success of a bad government's propagation of evil ends, moral principles grounded in universal facts of human nature are needed to ensure that virtues serve good ends and moral decisions are made with these ends in mind. The military serves the state, but it is a travesty when a competent instrument of military power pursues the evil ends of his client society's civilian leaders. Officers may resign their commission, but institutional pressures are such that this is rare, and the consequence of resignation in some cases can be severe.

My final criticism of Gabriel is practical. His proposed code of ethics is too long. Having ten provisions is acceptable and potentially useful, but they are too long to memorize and there is no guidance for how to apply the content to make concrete moral decisions.

¹⁵³ I only believe that the likelihood of wars of pure aggression and exploitation is lower in developed countries of the type I describe. Developed countries may and still do engage in immoral wars.

Hartle's traditionalism and American professional military ethics

Anthony Hartle has produced perhaps the most systematic work in American professional military ethics in recent years in his *Moral Issues in Military Decision Making*.¹⁵⁴ Hartle's audience is specifically the members of the American military profession and not all military professions in general. To Hartle, the moral end of the American military profession is to protect human rights that are derived from fundamental human values expressed in the U.S. Constitution and international law. To Hartle, this is the primary substantive reason that the American military profession exists. In his book, Hartle examines the complexity of American professional military ethics, and argues that it has been shaped by three factors: Functional requirements of the institution, international laws of war, and the core values of American society.¹⁵⁵ The functional requirements of the profession influence soldiers to be people who generally hold the following views: The state is the basic unit of political organization; threats and the likelihood of war are continuous; strong, ready, and diverse military forces are needed; order, hierarchy and organization are good; stabilizing institutions like church, family, and private property are highly regarded; and human nature is generally viewed pessimistically.

To Hartle, the core values of American society are crucial because the military profession's existence, maintenance, and governing principles comes from the society it serves. Sarkesian echoes this same point. "It is my claim that the military cannot bestow legitimacy on itself. This must come from society. If this is so, then the profession and professional values must be generally congruent with the values of society."¹⁵⁶

However, "generally congruent" does not mean "totally congruent" for Hartle. The military profession is necessarily partially differentiated from ordinary society. Military

¹⁵⁴ Hartle, op. cit.

¹⁵⁵ Hartle, op. cit., p 8.

¹⁵⁶ Sam Sarkesian, *The Professional Army Officer in a Changing Society*, Chicago: Nelson-Hall, 1975, p 240-241.

professionals are given specialized knowledge and restricted permission to legally employ deadly force, use lethal weaponry, and authorize intentionally sending human beings into great danger.¹⁵⁷

As a result, "military commanders must be tacticians, strategists, warriors, ethicists, leaders, managers, and technicians".¹⁵⁸ It is also partially differentiated because, ironically, to defend human rights, the military profession must violate some of the rights of its own members.¹⁵⁹

Hartle identifies eight values that he argues are the core values of the American professional military ethic. The first four are professional values; the second four are individual values that strengthen the first four. These values are not a code of conduct, but are general values gleaned from what I have called the "official documents." American military professionals,

1. Accept service to country and defense of the U.S. Constitution as a calling.
2. Place duty over personal interests.
3. Conduct themselves at all times as persons of honor, integrity, loyalty, and courage.
4. Develop and maintain highest possible level of knowledge and skill.
5. Take full responsibility for the manner in which orders are executed.
6. Promote and safeguard, within the context of mission accomplishment, the welfare of subordinates as person and not merely as soldiers.
7. Respect civilian control of the military and stay out of politics.¹⁶⁰
8. Follow the laws of war the service regulations.¹⁶¹

A Colonel with first-hand experience of the moral ambiguities of combat serving as a young infantry officer and commander in Vietnam, Hartle weaves his personal experiences of combat into his position on American professional military ethics through many excellent case

¹⁵⁷ Hartle grants "professional" status to officers only.

¹⁵⁸ Nye, op. cit., p 31.

¹⁵⁹ Hartle's view here is similar to Alan Goldman. Goldman argues that, in order to be a profession, a group has to meet two criteria, apply specialized knowledge and serve important interests of the client. The military profession obviously meets both of these. See Alan Goldman, *The Moral Foundations of Professional Ethics*, Totowa, NJ: Rowan and Littlefield, 1980, p 18.

¹⁶⁰ President Truman fired General MacArthur during the Korean conflict for acting in ways that showed an unacceptable disrespect for civilian control of the U.S. military.

¹⁶¹ Hartle, op. cit., p 52-53.

studies and examples. Hartle argues that, in addition to American social values, the moral foundation of the various laws, conventions, and treaties that compose international law is respect for human rights too, including those of soldiers, civilians, prisoners of war, wounded, the sick, etc.... For Hartle, this means that if there is a conflict between respecting human rights and using consequential reasoning to minimize suffering, then international law prioritizes respecting human rights over consequences.¹⁶² Service regulations seem to support this interpretation. U.S. Army field manual 27-10 says the following.

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance.... It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations.¹⁶³

On this fundamental point, Hartle's position is more similar to Axinn's Kantian view than the consequentialism of Fotion and Elfstrom or Brandt.¹⁶⁴ For Hartle, consequences should only be used to discriminate between two options that both respect rights.¹⁶⁵ Hartle also defends the general moral authority of official documents beyond just the U.S. Constitution. He argues that these documents also demonstrate fundamental respect for human rights and the rule of law.

For Hartle it is crucial to show that the official documents and international law embodied in the various treaties and conventions are consistent on the issue of respecting human rights. According to the U.S. Constitution, treaties are the law of the land. If the United States signs treaties and conventions governing military ethics and those treaties and conventions contradict the rights guaranteed by the U.S. Constitution, then the U.S. Constitution would be

¹⁶² Hartle, op. cit., p 71.

¹⁶³ FM 27-10, Chapter 3, Section III, paragraph 85. See online posting <<http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/Ch3.htm#s3>> for text.

¹⁶⁴ I only review Fotion and Elfstrom's book in this chapter, but I mention Brandt here because he also takes a consequentialist position on military ethics, arguing that the laws of war have a coherent utilitarian justification, that they produce greater good overall. See Richard Brandt, "Utilitarianism and the Laws of War", *Philosophy and Public Affairs*, vol. 1 Winter 1972, p 145-165.

¹⁶⁵ Hartle, op. cit., p 76.

inconsistent at Article 2, Section II.¹⁶⁶ U.S. soldiers could owe unlimited liability to obey and defend contradictory principles. Hartle argues that the provisions of the Geneva and Hague Conventions do respect human rights and do not contradict the customs, traditions and rules that are grounded in the U.S. Constitution, which gives the American military profession its primary moral authority.¹⁶⁷

My chief criticism of Hartle's position concerns his view that the military is a partially differentiated profession. I agree with Hartle on this point only generally. Soldiers are obviously permitted by law to do things that are illegal for civilians to do. The military service has a monopoly on using force in certain ways. That fact is sufficient to partially differentiate the military profession from ordinary society. But Hartle takes this argument further and says that the special charge of the American soldier is to defend U.S. constitutional principles that respect fundamental human rights.¹⁶⁸ The problem for Hartle is that successfully defending fundamental human rights requires that the soldiers who defend those rights forfeit their own fundamental human rights. Hartle just seems to accept that this is an inevitable paradox. Hartle agrees with David Richards' position on the Founding Fathers' view of human rights at the time they wrote the U.S. Constitution. Richards said,

...the Founding Fathers believed that the rights guaranteed...in the Bill of Rights were natural moral rights which government had no right to transgress. Man, they supposed, was foremost a moral person, a secondarily a member of a political union."¹⁶⁹

¹⁶⁶ Speaking of presidential powers, Article 2, Section II of the U.S. Constitution states that the president, "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur ... "

¹⁶⁷Hartle, op. cit., p 100-101.

¹⁶⁸ Hartle makes this argument too. Hartle op. cit., p 30-32.

¹⁶⁹ David Richards, "Reverse Discrimination and Compensatory Justice: Constitutional and Moral Theory," *The Value of Justice*, edited by Charles A. Kelbley, New York: Fordham University Press, 1979, p 104-105.

If Hartle believes as Richards does, then it would seem wrong to compel members of one segment of the population (age, gender, skills) to forfeit their rights to defend the rights of other citizens. This is marginally acceptable only when the services are all-volunteer-forces. When the U.S. needs to institute a military draft, his emphasis on rights needs to be cashed out further.¹⁷⁰ Hartle could avoid this problem if he held that human rights were a gift of the state, granted and withheld as necessary, but his view would then contradict the U.S. Constitution. Another more preferable route he could take would be to take rights as conditional on the harms that respecting these rights prevents that moral agents want to avoid. Respecting rights could then be consistent with what the U.S. Constitution states about them, but would also be subject to exceptions that would include denying rights to some citizens (soldiers) in order to prevent much worse harms for the most citizens.¹⁷¹

Hartle is also subject to the same psychological criticism I made of Axinn's Kantian military ethics two sections ago in this chapter. Soldiers are taught that they fight for certain values. Knowing these values can help to sustain a prisoner of war barraged with propaganda. But in the fray, soldiers are motivated to fight is each other, including their comrades, family, and friends. Like Axinn, Hartle's military ethic misses this important source of human motivation. Values may ground the American professional military ethic and give the soldier a moral purpose. When the battle rages, soldiers are motivated to protect those they care about (including themselves) from harm.

¹⁷⁰ I say this is only marginally acceptable for an all-volunteer-force (AVF) because it seems likely that service in an AVF would be more desirable for the poor and would unfairly distribute the burden of national defense on the lower classes. If national defense were a citizen's responsibility, then a draft that includes all social classes would be preferable. It would also influence civilian leaders in making decisions to use the military services, since more of their children would be serving when those decisions were made.

¹⁷¹ I address Gert's solution to this problem in Chapter 3 and 6. For Gert, governments can violate moral rules against its citizens if these violations are morally justifiable, such as is the case with taxation. Gert's account explains why governments can be morally justified in taking away the freedom of some of its citizens to, e.g., to serve in the Armed Forces in order to prevent worse evils, such as conquest by a belligerent enemy or guarding borders and embassies.

I also question Hartle's optimism about the U.S. Constitution. For example, before the 13th Amendment abolishing slavery, the U.S. was obviously selective in respecting constitutionally grounded *human* rights fairly.¹⁷² The U.S. has a checkered past in the way it has interpreted its constitution with respect to groups like blacks, Indians, and women. If, e.g., an officer was placed in charge of keeping order on the brutal march from Indian homelands to arid reservations, or for seeing to it that segregated black units were given dirtier, more dangerous missions in WW II, then I do not think Hartle's view has the theoretical tools to criticize these abuses. In short, he begs the question of how to interpret the constitution within military ranks. His military ethics is easier to sell to soldiers who generally could care less about what Rawls or Gert says about ethics. However, during times of systematic abuse of constitutional ideals within the military, his theory seems to take on a more crude commitment to functional excellence that is confined to dedication to the status quo.

Finally, Hartle may be vulnerable the same criticism that Fotion and Elfstrom employ against nonconsequentialist theories in general. For example, when rights conflict, as they do in complex moral situations, rights theorists do not provide a coherent decision procedure to assist military professionals. Hartle provides a code of military ethics and grounds his military ethics in rights, tradition, and law (including international law). However, for American military professional looking for help in making complex moral decisions in difficult cases, Hartle provides no concrete decision procedure, such as Gert's two-step decision procedure consisting of a simple template of questions for teasing out morally relevant features and a morally decisive question to settle controversial matters.

¹⁷² I spoke with Colonel Hartle at the Joint Services Conference on Professional Ethics in Washington DC in January 2003. Hartle told me his point for writing *Moral Issues in Military Decision Making* was to both ground American professional military ethics in principles and traditions that ordinary military leaders would want to commit to and remain loyal to. The book was also a response to his experiences of ethical lapses of military leaders witnessed during his combat experiences in Vietnam.

A few words on the principle of double effect and American professional military ethics

The principle of double effect has been useful to American military professionals as a tool to assess military missions that are known to cause injury and death to innocent civilians. The principle makes a distinction between actions that cause foreseen but unintended consequences, making actions that cause foreseen but unintended consequences sometimes justifiable, and actions that intentionally injure or kill innocent civilians rarely or never justifiable. Foreseen but unintended consequences are a frequent byproduct of military operations.¹⁷³ Even though American military professionals have generally accepted the principle of double effect, there are some examples that attempt to justify overriding the principle when a morally evil enemy threatens national survival.¹⁷⁴ Walzer, e.g., argues that Great Britain was in such a state of "supreme emergency" in WWII between the fall of France and U.S. entry into the war and that this justified Britain's intentional bombing of civilian targets.¹⁷⁵ Walzer further

¹⁷³ Roman Catholic theologians formulated the principle of double effect in the sixteenth century, especially by the Salmanticenses. The principle states that where an action, intended to have a good effect (e.g. 'relieve pain'), can achieve this only at the risk of producing a harmful effect ('perhaps end life'), then this action is ethically permissible because the stated intention is the former. St. Thomas may have understood it when he argued in the *Summa Theologiae* (2a2ae, 64.7) that a person might kill an unjust aggressor when this is necessary to save his own life. It has remained popular, I think, because it appeals to our moral intuitions that there is a genuine difference between effects intended and effects only foreseen. Ordinary people think this way without knowing the principle of double effect by name. Walzer makes this point when he recounts the fact that many WWII pilots on the American side objected to bombing civilians intentionally. Pilots' common sense view is that unintentional collateral damage as morally acceptable if the target is justifiable the principles like military necessity and proportionality.

¹⁷⁴ There are noteworthy American exceptions to general acceptance of the principle of double effect. Sherman justified burning Atlanta and his indiscriminate campaign through South Carolina on consequentialist grounds, arguing that "War is hell" and that when the enemy is doing morally evil things like enslaving large segments of the population, all means to end the conflict quickly are morally acceptable. U.S. Air Force General Curtis LeMay was a military realist who generally thought the end of victory justified almost any means. He assumed command from a commander who morally objected to ordering the incendiary raids on Japanese cities late in WWII. LeMay ordered aviators to firebomb Tokyo. The resulting fires killed more civilians than were killed by the dropping of 'Fat Man' on Hiroshima. See Walzer, op. cit., p 257. Walzer draws this conclusion from research gleaned from the 1969 Rand Corporation report, *The Road to Total War: Escalation in World War II*, by F.M. Sallagar, p 157-158.

¹⁷⁵ I hesitate to call these civilians totally innocent. This is ambiguous territory since civilians decide when to go to war. Civilians work in places like munitions factories and grow food that empowers soldiers in the field. Nevertheless, it seems absurd to argue that terror bombing is justified on these grounds when the bombing causes indiscriminate killing of large numbers of innocent children. British pilots bombed neighborhoods and not only places like factories that contributed, if indirectly, to the German war effort.

argued, though, that later in the war bombing civilian targets intentionally was immoral and based on crude utilitarian calculation. For example, the savage firebombing of Dresden in 1945 was immoral since the state of supreme emergency was well over by that time.

Interestingly, pilots who objected to intentionally bombing civilian targets inside Germany implicitly used double effect principles. I think ordinary persons subconsciously employing common morality accept the principle of double effect. Impartial moral agents are more willing to publicly allow actions that cause foreseen but unintended injury and death to innocent civilians than they are willing to allow actions that intentionally cause injury and death. All conscientious moral agents agree that intentionally killing innocent civilians is normally immoral. Even the British authorities during WW II quietly admitted that continuing their policy of firebombing late in the war was immoral. While British fighter command was awarded the highest military honors after the war, bomber command, the command that carried out the firebombing raids, was snubbed, even though early in the war bombers were Great Britain's only defense against German aggression. Bomber Command suffered more losses than Fighter Command and bomber command pilots fought with exceptional gallantry. Sir Arthur Harris, who commanded bomber command from 1942 to the end of the war, was also snubbed. Unlike many other commanders from WWII, Harris was not awarded with the customary peerage for his service. Walzer puts it well. "They did what they were told to do, but were dishonored for doing it".¹⁷⁶

Conscientious moral agents are more willing to cause unintentional harm if the benefits justify it, even if the harm is foreseen. They also know though, that if it were possible to achieve the same result by avoiding causing injury and death to innocent civilians, then normally that option is morally preferable. To cause evil intentionally does not have this feature. A physician who cuts off your leg to keep a cancer from killing you can justify his action using the principle

¹⁷⁶ Walzer, op.cit, p 324.

of double effect. The loss of the leg is foreseen, but is unintended, since the physician would gladly not cut the leg off if there were another successful treatment option that would provide a commensurate probability of saving the patient's life without causing a permanent disability.

Conclusion

In this chapter I surveyed the contemporary literature on AMPE. I formed a rough taxonomy that breaks the APME literature into official documents and literature of aspiration and evaluation. The official documents consist of the U.S. Constitution, oath of office, commission, laws of war, federal law, service regulations, ethics regulations, and the code of conduct. The literature of aspiration and evaluation discusses, analyzes and interprets the exhaustive and diffuse content of the official documents more fully. Both work together and overlap somewhat in their content. The literature of aspiration and evaluation can take any of a number of philosophical and polemical approaches. I broke these approaches into two broad categories. The thematic literature discusses a host of important military ethics issues such as honor, character, military virtues, and the warrior ethos. The more philosophically rich systematic literature attempts to ground American professional military ethics in classic moral concepts such as virtue, duty, consequences, tradition, and rights. With the systematic literature I discussed and briefly assessed four core American authors, i.e., Fotion and Elfstrom, Axinn, Gabriel, and Hartle, each of which are contemporary and influential, and each of which represent dominant western ethical traditions. I explained their philosophical approaches and briefly highlighted a few weaknesses I saw in each one. At the end of the chapter I briefly discuss the influential and common sense principle of double effect.

One of the goals of this chapter was to acquaint the reader with the diverse and important sources of official and unofficial ethical guidance available to American military professionals. I covered what I think is the important official and unofficial American professional military ethics literature that military professionals can refer to when faced with a complex moral decision in the

field. My second goal in this chapter was to set the stage for exploring whether Bernard Gert's theory of moral rules can be used to coalesce and systematize these diverse sources into an assessable, efficient, and useful moral guide consistent with the common morality everyone uses.

CHAPTER 3 GERT'S DESCRIPTION AND JUSTIFICATION FOR THE COMMON MORAL SYSTEM

Introduction

Gert states that the goal of his moral theory is to describe, explain, and justify the common moral system in a way that "does justice to its complexity and subtlety."¹ He chooses the goal of describing the common moral system because "Any theory, scientific or moral, must start with a clear account of that which is to be explained."² Gert's goal is minimalist because the common moral system he describes is minimalist. He says that his moral theory

...does not provide unique answers to every moral question, nor does it try to show that it is irrational to act immorally. It only provides a universally acceptable framework for dealing with moral problems. It does this by making explicit and justifying the moral system that people normally use when they make moral decisions and judgments.³

This chapter explicates Gert's moral theory, i.e., his description of the common moral system that "people normally use."⁴ I explain what this common moral system is by describing its general features. Then I compare it to the grammatical system that all competent speakers of a language naturally use. Finally I explicate the key concepts Gert argues are necessary in order to describe the common moral system.

¹ Bernard Gert, *Morality Its Nature and Justification*, New York, Oxford University Press, 1998. I focus on this work because it is the most recent articulation of a moral theory that Gert has been developing, with periodic revisions and additions, since the mid 1960s. Hereafter, all references to this work will be cited with the letters MNJ, followed by the page numbers.

² Bernard Gert, "Morality, Moral Theory and Applied and Professional Ethics," *Professional Ethics: A Multidisciplinary Journal*, vol. 1, no. 1 & 2, Spring/Summer 1992, p 8.

³ MNJ, p xii.

⁴ I focus on Gert recent version of his description of the common moral system in *Morality: Its Nature and Justification*. Gert developed his theory over the last 40 years; his mature view is described in this book. Gert uses "common moral system", "morality", and "common morality" interchangeably when contrasting it with moral theory.

Reasons Gert Provides For Why His Theory Is Better Than The Alternatives

Gert offers several reasons why he thinks his moral theory and moral decision procedure are better than the alternatives that other moral philosophers provide. Each of these reasons are grounded in Gert's claim that his moral theory is a better description of the common moral system that all moral agents implicitly use when they make moral decisions and judgments.⁵

For Gert, most philosophers make the crucial mistake of trying to invent a morality they think everyone ought to use rather than accurately describing and justifying the common morality moral agents actually do use. Even the most influential moral theorists, such as Kant, Mill, and Rawls, had this problem. To Gert, an accurate description and justification of common morality is important, not only for presenting an account of morality that is systematic, accessible, and useful, but for presenting a theory that strikes moral agents as one that explains and clarifies the moral system they are already using to make moral decisions and judgments.⁶

Gert claims up front that his moral theoretical aims are modest both in his description of common morality and his justification for it. For Gert, having modest theoretical aims is appropriate given (1) that morality is much more complex than most moral theorists would like to admit, and (2) human beings are limited by being fallible, vulnerable and epistemically limited. Of the modesty of his aims for describing common morality Gert states,

I recognize and accept that common morality does not provide unique answers to every moral question. I do not try to make morality do more than it can.... My only claim to originality concerning morality is in the explicitness of my recognition of its limitations.... My description of common morality may not be one that people want to hear.... Common morality does not provide the kind of simple procedure for deciding what morally ought to be done that most philosophers provide. It sets limits on what is morally acceptable, but it rarely provides a unique solution to a morally controversial problem.⁷

⁵ Bernard Gert, *Common Morality*, a working draft for an upcoming book, Department of Philosophy, Dartmouth College, 2002, p i. Hereafter, all references to this work will be cited with the letters CM, followed by the relevant page numbers.

⁶ MNJ, p 6.

⁷ CM, p i.

Of the modesty of his aims for justifying common morality he states,

My attempt to show that all rational persons would endorse morality is qualified, depending on extreme limitations on the beliefs that can be used as well as other conditions. I do not try to show that it is irrational to act immorally; I show only that it is never irrational to act morally. I am trying to do far less than what philosophers from Plato on have failed to do. Thus, even if I succeed completely in what I am trying to do, people may be disappointed. It is also disappointing that there is no perpetual motion machine.⁸

Gert claims that accepting these limitations that are required in order to provide an accurate description and justification for common morality has several benefits. It explains the fact of moral disagreement and eliminates the futile moral theoretical requirement that all moral disagreement can be overcome with more and better moral theorizing.⁹ Accepting this fact mitigates moral dogmatism, since moral agents no longer have to think that people who disagree with their considered moral judgments are irrational, uninformed, or partial.¹⁰ Moral discussants can make compromises without feeling that they are necessarily sacrificing their moral integrity. Accepting this fact also makes it easier for subordinates to accept the potentially divisive decisions of their leaders.

Another benefit that Gert claims his moral theory has is that it provides a rich account of the content of our considered moral judgments rather than focusing too much on the form of those judgments. Gert states,

Philosophers as diverse as Brandt, Gauthier, Gewirth, Hare, and Rawls do not even consider the possibility that the basic definition of rationality must be given in terms of a specific content, for example, a list, and there is no formal way to generate that list.¹¹

⁸ CM, p i.

⁹ I will briefly discuss Gert's sources of irresolvable moral disagreement later in the chapter.

¹⁰ This result is important because consensus is not a necessary goal of controversial moral decisions made by responsible groups. For example, Supreme Court cases are frequently decided without unanimous agreement. For Gert, these disagreements among the justices does not necessarily mean that one side of the issue is acting irrationally in that case or is not as well informed as the other justices.

¹¹ Bernard Gert, "Rationality, Human Nature, and Lists," *Ethics*, vol. 100, January 1990, p 279.

For Gert, the moral decisions and judgments of people employing the common moral system are based on harms that all moral agents want to avoid for themselves and those that they care about. For Gert, statements like "Morality is concerned primarily with lessening the amount of harm in the world" are only moral slogans unless an adequate account of 'harm' is provided. 'Harm' must have content; for Gert, this content is best described in terms of a *list*. What is on the list of harms that all rational moral agents want to avoid unless an adequate reason can be provided for suffering one or more of them? For Gert these harms are death, pain, disability, loss of freedom, and loss of pleasure. Without cashing out what 'harm' means, the aforementioned slogan is useless for making moral decisions and judgments in concrete situations. Yet, for Gert this is precisely what many philosophers do. For Gert, the items on the list are based on facts about human nature, not on astute logical arguments. The list is basic. Someone who said they wanted to experience any of the items on this list for no reason would not need moral education but psychiatric help.¹²

Gert also claims that his description and justification of common morality has the advantage of salvaging what is positive in other influential moral theories while overcoming what is problematic in those theories. This is one reason why Gert says that his moral theory "has been characterized as Kant with consequences, as Utilitarianism with publicity, and as Ross with a theory."¹³

Gert vs. Kant

Gert's general criticism of all moral theories is that they describe common morality incorrectly. The counterintuitive results that each of these theoretical alternatives support is the evidence for this general criticism. For example, while Gert shares Kant's view on the crucial importance of rules, he criticizes Kant for holding that moral rules are absolute. Rather, moral

¹² Ibid, p 287.

¹³ Bernard Gert, "Morality, Moral Theory, and Applied and Professional Ethics," op. cit., p 13.

rules are universal but not absolute. This distinction provides room for assessing justifiable exceptions to moral rules and for explaining the fact that many moral decisions have more than one morally acceptable alternative.¹⁴ For Gert, everyone who implicitly employs the common moral system knows that all moral rules have justifiable exceptions.

Gert also criticizes Kant's moral theory for ignoring the crucial first step in the two-step procedure people use to evaluate proposed actions that will violate moral rules. Kant leaves out any discussion of a procedure for ascertaining morally relevant facts for determining what kinds of actions should pass his universalizability test.¹⁵ Providing a method for isolating morally relevant features is crucial for framing particular situations that need to be morally assessed.¹⁶ That Kant does not provide this tool for framing maxims explains why his discussion of maxims and their universalizability has been is obscure and controversial. This lack of a procedure for framing maxims for action makes the universalizability test too difficult to apply in concrete situations.

Gert also claims that Kant's universalizability test, which Gert thinks is somewhat similar to the morally decisive step two of his decision procedure, fails because the test is so strong that it ends up being absurd. Gert states, "It is simply false that a rational person is acting immorally whenever she acts on a maxim that she would not favor everyone acting on."¹⁷ For example, if a soldier is fighting an enemy courageously, his courageous fighting is not immoral in virtue of the fact that he would not will that enemy soldiers fight courageously that day. It is rational to want the enemy not to fight this way.

¹⁴ MNJ, p 115.

¹⁵ See Immanuel Kant, *Critique of Practical Reason*, translated by Lewis White Beck, New York: Bobbs-Merrill, 1956, p 27.

¹⁶ Kant uses unique language to describe this process. He does not talk in terms of framing a particular moral problem, but talks in terms of framing one's *maxims* for action.

¹⁷ MNJ, p 305.

Kant's universalizability test is too strong for another reason. For Gert, Kant made the mistake of thinking that universalizability was necessary to preserve moral impartiality. It is not. Gert claims that it is not necessary for moral impartiality that a moral agent *wills* that all moral agents act a particular way; it is sufficient to consider what would happen if everyone *knew* that they were *publicly allowed* to act a particular way in the situation at hand and all relevantly similar situations. Morally justifiable exceptions to moral rules are not necessarily those that moral agents *would* necessarily act on, but those that they know they *can* act on without consequence. For Gert, this weaker criterion of moral justifiability accounts for the fact that many moral situations present moral agents with more than one morally acceptable alternative.

Finally, Gert claims that superiority of his theory over Kant's with regard to describing how moral agents normally think of the concept of duty. For Gert, Kant obfuscates 'duty' by taking it as a general concept that refers to both perfect and imperfect moral obligations. This is confusing and, to Gert, incorrect. For Gert, duty has a precise meaning that refers to moral responsibilities associated with professional and other social roles,¹⁸ though it is sometimes used *colloquially* to describe one's moral obligations to obey the moral rules unless an exception to those rules is justifiable. Kant's use of "imperfect duties" also creates a confusion that Gert claims his theory overcomes. To Gert there are no imperfect duties. Rather, imperfect duties refer to moral ideals, which moral agents employing the common morality think should only be encouraged except in rare circumstances or in the context of fulfilling duties associated with professional and social roles.

Gert vs. Consequentialism

Gert claims that his moral theory is an improvement over consequentialism for several reasons. All forms of consequentialism that consider actual consequences to be *the* morally relevant feature for determining moral obligations are implausible, since they do not recognize

¹⁸ MNJ, p 209

the fact of human fallibility as fundamental to common morality.¹⁹ No one can calculate actual consequences accurately. For Gert, "Consequentialism, of which utilitarianism is a particular form, is the right kind of moral system for a society of omniscient persons. But there are no omniscient persons."²⁰ Consequentialism also fails to describe common morality accurately because it justifies actions that are counterintuitive, i.e., actions that fully informed impartial moral agents using only rationally required beliefs would not publicly allow. A common criticism of consequentialism is that it justifies actions such as cheating when no one will find out and the benefits achieved warrant it. Impartial moral agents using only rationally required beliefs would not publicly allow cheating even when no one will find out about it and the cheater benefits.²¹

For Gert, consequentialism remains popular with philosophers because they so often present their examples so that there is never a doubt about what the actual consequences will be. Moral agents rarely have the benefit of such knowledge when they make moral decisions.

Gert also claims that his view improves on consequentialism because his theory accounts for the diversity of morally relevant features, and because consequentialism ultimately, and incorrectly, recognizes only one such feature. Where consequentialists do recognize diverse morally relevant features, they are morally relevant only as aids to determining the consequences of a particular action rather than as guides for determining what impartial moral agents would publicly allow. Consequentialists cannot consider hypothetical situations, such as considering what would happen *if* everyone knew that they were allowed to act in a certain way. Such contrary-to-fact conditionals do not focus only on the consequences of a particular action given

¹⁹ MNJ, p 205.

²⁰ MNJ, p 206.

²¹ MNJ, p 213-214.

the facts, but on the morally relevant facts that are crucial for determining what impartial moral agents would publicly allow.²²

Gert also criticizes *rule* consequentialism as an inaccurate description and justification of common morality. Rule consequentialism is an attempt to save consequentialism from forceful criticisms such as the inability to calculate consequences effectively and to hedge against what are obviously counterintuitive results. However, for Gert rule consequentialists must either think that their rules have exceptions or they do not. If they have no exceptions, they end up becoming so cumbersome and lengthy that they are impossible to know and apply effectively. This long and complicated list of rules is obviously not the list of rules that are part of the common moral system that everyone implicitly uses to make moral decisions. Since there are irresolvable moral disagreements among fully informed moral agents, different moral agents will have different lists of moral rules that they abide by. Since different moral agents would have different and lengthy lists of moral rules, it would be impossible to make legitimate moral judgments about the behavior of other moral agents. Other moral agents would be ignorant of many of the rules on another moral agent's personal list of moral rules.

On the other hand, if the moral rules have exceptions, Gert claims that they would be very similar to his ten moral rules, the difference being that consequentialists could only use them to guide assessments of the consequences of particular actions. If these rules are used to make moral decisions by invoking hypothetical situations too (such as considering what fully informed impartial moral agents would publicly allow) then rule consequentialism is so in name only. It is actually a deontological view. If these rules have exceptions and no hypothetical situation is invoked, then rule consequentialism collapses into act consequentialism, whose problems are well known.²³

²² MNJ, p 213-214.

²³ MNJ, p 213-215.

Gert vs. Rawls

Gert acknowledges the important contributions of Rawls to moral theory but claims that his views have a few other problems that his description of common morality overcomes. For Gert, a veil of ignorance is not necessary for moral impartiality. By eliminating individuality, the veil of ignorance effectively eliminates features that lead to moral disagreement. Eliminating moral disagreement is a practical impossibility given the natural limitations of human beings. People can be morally impartial and still disagree.²⁴ Umpires disagree about how to interpret the strike zone in baseball but both can apply the rules without being swayed by who is harmed or benefited by how they apply the rules.

Gert also criticizes Rawls for placing an inordinate emphasis on liberty over the prevention of harms that all moral agents want to avoid. Gert states, "If Rawls were to have concentrated on preventing harms rather than distributing benefits, he may have come to realize that preventing a loss of freedom is not more important than preventing all of the other evils."²⁵ For Gert, people care more about not experiencing harms than they do about gaining goods. In prioritizing these issues incorrectly, Rawls gives an account of morality that is different from the common moral system that all moral agents use.

Gert also claims that his two-step moral decision procedure provides a better account of how people make moral decisions than Rawls's position. Rawls presupposes that a moral theory provides a decision procedure, and that when one's moral theory and considered moral judgments conflict, moral agents must bring these two elements together in "reflective equilibrium." This process involves changing one's considered moral judgments to come in line with one's moral theory or changing one's moral theory to come in line with one's considered moral judgments. For Gert, Rawls' account of reflective equilibrium is problematic because a moral theory should

²⁴ MNJ, p 147-148.

²⁵ MNJ, p 375.

be an explicit description justification for how moral agents actually do make moral decisions. Rawls presupposes that there is a right answer to every moral problem and that it is the job of moral theory to generate these answers.²⁶

Gert vs. Ross

Finally Gert thinks that his theory is an improvement over Ross's *prima facie* duty theory because he actually gives a procedure for assessing proposed violations of moral rules. Ross gives no such procedure. Rather, for Ross competing duties are weighed and moral decisions are made using moral intuition. Ross shares Gert's emphasis on the priority of the duty of nonmaleficence, which in Gert's language refers to the view that common morality is *primarily* concerned with the lessening of evil or harm in the world. Ross also shares Gert's view that all moral rules have exceptions, though Gert provides a theoretical justification for moral exceptions that he would argue is superior than appealing to the cultivated intuitions of the Oxbridge Man.

The Common Moral System

Gert says that the common moral system "is the system that thoughtful people use, usually implicitly, when they make moral decisions. It is the only guide to behavior affecting others that all rational persons [moral agents] understand and upon which they can all agree."²⁷ Gert also says that the common moral system is an "informal public system...and includes what are commonly known as the moral rules, ideals, and virtues, and has the lessening of evil or harm as its goal."²⁸

All rational persons necessarily understand this system and agree that it should guide moral decision-making because all human beings are vulnerable to harms such as death, pain, and disability. Rational moral agents all necessarily want to avoid harm unless an adequate reason

²⁶ MNJ, p 379-380.

²⁷ CM, p i.

²⁸ CM, p 13.

can be given to suffer it. The common moral system is a universal system because all rational persons necessarily want to avoid harm. Most people who use this system cannot describe it in words, yet they normally use it effectively.

Gert explains that the common moral system is **informal** because there are no official moral police or judges to enforce what morality requires, encourages, permits, and prohibits. It is a **public** system because knowledge of the common moral system is not esoteric knowledge for a privileged few. Common morality is a guide that is used **implicitly**. People use the system to guide their decisions, usually subconsciously, and they are generally not conscious of its key features. People use the common moral system the way most people use automobiles. Few people have a clear understanding of how their cars are put together and the laws of chemistry and physics that make them work successfully. However, under normal conditions nearly every adult can drive cars easily, efficiently, and safely without even giving it a second's thought. And all competent car drivers know when someone else is driving poorly.

Common morality is **concerned primarily with actions**, not with beliefs and desires. It is a "guide to behavior affecting others".²⁹ For Gert, it is a system that **all rational people accept and use** by definition. All human beings are vulnerable to harm, and all rational people want to avoid unjustified harm. Thus, no rational person would conclude that killing a moral agent for no reason is morally permissible. For Gert, a person who disagreed with the prescription that "Killing for no reason is immoral," would not need remedial moral training but a psychiatrist. Because humans are vulnerable, rational persons universally agree that a few basic actions that cause harm are *prima facie* immoral.

Since all rational people want to avoid unjustified harm, the **function** of the common moral system is to lessen evil or harm. This goal makes it possible to explicitly formulate moral rules that prohibit causing harm in a way that all rational people can know, understand, and

²⁹ CM, p i.

accept. Finally, the common moral system provides all moral agents with a subconscious **tool** to use to make moral judgments about others' actions. To summarize, the common moral system is an implicitly and universally accepted informal public system that moral agents, i.e., persons who are responsible for their actions, use to protect themselves from others who might want to cause them harm.

Gert's view that there is a common moral system seems *prima facie* problematic because there is much intractable moral disagreement among moral agents, including moral philosophers, on fundamental topics like abortion and capital punishment. However, Gert holds that within the diversity of moral views there is a core that all moral agents subconsciously employ to make moral judgments. Gert describes the necessary features of this system in such a way that to deny the common moral system would be irrational. Gert states, "I do not claim that everyone uses exactly the same moral system, but I prefer to consider the differences, some of which are quite significant, as variations of a single system."³⁰

Another way to understand the common moral system is by comparing it with the grammatical system.³¹ The grammatical system shares several features with the common moral system. It is an **informal** system; there are no "grammar police" or judges in charge of policing grammatical miscues. It is also a **public** system because it applies to everyone who speaks a language, not just to a few linguists who have explicit knowledge of the system. The grammatical system is also an **implicit** guide. Every speaker uses it to communicate and interpret what other people say despite lacking explicit knowledge of its rules. Everyone who speaks a language competently knows that there is a grammatical system for his or her language; they also

³⁰ MNJ, p 4. That Gert uses the word 'prefer' here is telling. Gert knows there are substantial differences in moral views within and between cultures, families, and other groups. He prefers to think that there is a common identifiable core (overlap) within all of these diverse positions. His moral theory is an attempt to explain and justify that position.

³¹ MNJ, p 4-5.

know how to use it to communicate effectively without giving it a second's thought. However, most people cannot describe it effectively. Like the common moral system, the grammatical system is **concerned primarily with actions** between competent users. It does not make much sense to talk of grammatical beliefs, but of grammatical usage. Its **function** is to be a tool of communication. The grammatical system is like common morality because there is diversity within it and users disagree on some points. However, like the common moral system, grammatical variations do not preclude the possibility of a core grammatical system beneath the diversity. Gert says that our ability to competently communicate indicates the presence of this core.

...the appropriate test for an account of a grammar is to determine if it allows speaking in a way that all competent speakers regard as acceptable and rules out speaking in a way that is recognized as unacceptable by all who are competent speakers of the language.³²

The grammatical system and the common moral system are also similar because ordinary people naturally use both to judge the adequacy of how they are employed. If someone spoke without using proper subject/verb agreement, then any competent speaker listening would intuitively know this person was speaking incorrectly. Likewise, if any moral agent heard someone say he wanted kill his girlfriend for not dating him anymore, then any competent moral agent would judge the person to be considering an immoral act. This example highlights another feature that these systems share. Competent speakers and competent moral agents usually make grammatical and moral judgments independently of experts. If a linguist proposed changing how subject/verb agreement was spoken in a language, then most competent speakers would probably ignore him. The same holds true for moral theory. People use the common moral system and usually ignore moral theory when they make moral decisions. Gert's challenge is to describe this common moral system without falling into impenetrable obscurity. If it is too obscure it will be ignored. If it leads to counterintuitive conclusions, it will also be ignored.

³² MNJ, p 4-5.

To Gert, the analogy between the common moral system and the grammatical system is strong. It provides an intuitive pump to show what common morality is really like. The analogy shows, importantly, that the common moral system is not the only system that people know and use subconsciously with great deft and precision, but which they cannot describe.

Everyone consciously and subconsciously uses the common moral system to make moral decisions. To Gert, a moral theory should clarify, explain, and justify the common moral system, just as an adequate psychological theory should clarify, explain, and justify how the healthy mind actually works and how to pinpoint disease, dysfunction, and potential remedies. Psychological theories do not describe how the mind ought to work. They do not suggest that people ought to change their behaviors to accommodate some novel model of the mind, irrespective of how minds actually function. Similarly, moral theorists should not show how the common moral system ought to work, but how it actually does work.

So far I have explained what the common moral system is. I briefly discussed its key features, and then how it shares these features with the grammatical system. The analogy to the grammatical system shows that common morality is, like the grammatical system, not just a figment of theorists like Gert. In the rest of this chapter I explain Gert's description of the common moral system by discussing Gert's account of key concepts in that system.

Human Nature

Gert's description of the common moral system is grounded in three universal facts of human nature. All human beings are vulnerable and fallible, and most are rational.³³ To Gert, all human beings are vulnerable to harms such as death, pain, and disability. Human beings can

³³ Gert does not explicitly claim that these three features are necessarily the only universal facts of human nature. He does state that vulnerability, fallibility, and rationality are presuppositions of the common moral system that no thoughtful human being concerned with morality can deny. The beliefs that all human beings are vulnerable and fallible are rationally required. The concept of moral responsibility presupposes human rationality. Only rational persons are held morally responsible for their actions. See MNJ, p 36, 205, 240-241.

suffer harms as a result of natural causes such as disease and violent storms. Peoples also can suffer harms as a result of the actions of other people.

It is also the case that all people are fallible. All human beings have limited knowledge and they make mistakes.³⁴ Often human beings do not know what the consequences of their actions will be and this ignorance leads to bad moral decisions. People also can know the consequences of their actions and still make bad moral decisions anyway.³⁵

For Gert, the common moral system presupposes rationality as a necessary feature of moral agents. Most human beings are rational also, though in particular cases, otherwise rational moral agents can make specific irrational decisions. Human rationality is necessary both for attributions of moral responsibility for one's actions and for accountability for one's moral judgments.³⁶ Only rational human beings are morally responsible for what they do. The insane, infants, and animals are individuals that no moral agent holds morally responsible for their actions and judgments.³⁷ Gert's discussion of rationality is complex, and he treats this fact about human nature in more detail than he does the facts of vulnerability and fallibility.

Rationality and Irrationality

Gert provides accounts of rationality and irrationality that he argues are fundamental to any plausible description of the common moral system.³⁸ Gert's most important insight in his

³⁴ MNJ, p. 4-5.

³⁵ Moral agents may lack the will to do what they know they should do, or they may have the will to do what they should do but prefer to do the bad thing anyway.

³⁶ MNJ, p 32.

³⁷ MNJ, p 33. For Gert, rationality is a necessary but not a sufficient condition for moral responsibility in the common moral system. For Gert only humans are held morally responsible for their actions, even though it is possible, e.g., that dolphins are rational too. To Gert, what makes human beings unique is morality.

³⁸ Applying rationality to dolphins and other nonhuman animals is an interesting issue, but is one that Gert avoids. Gert focuses on rationality as applied to agents subject to moral judgments. As of now, that only includes human beings.

account of rationality and irrationality is the view that *irrationality is conceptually more primitive* than rationality in the common moral system.³⁹ In other words, Gert defines rationality in terms of irrationality.

For Gert, irrational actions are intentional actions performed by fully informed moral agents that are believed to cause or significantly increase the risk of causing (avoidable) harm when there is no compensating benefit that justifies suffering it.⁴⁰ The harms that all moral agents want to avoid are death, pain, disability, loss of freedom, and loss of pleasure. This fact, Gert argues, can be accepted without the aid of empirical research.⁴¹ As a result, moral agents, i.e., persons who are morally responsible for their actions, would never seriously ask the question "Why shouldn't I act irrationally?" A test of whether an action is irrational is whether fully informed moral agents would ever intentionally do that act or advise someone they care about to do that act.⁴² No fully informed moral agents would ever intentionally do or advise those they care about to intentionally perform an irrational action.

Gert's account of irrational action is objective, normative, and supplies needed content. All moral agents know what counts as irrational actions because all moral agents want to avoid fundamental harms unless they are adequately justifiable. The concept is *objective* since it is a

³⁹ MNJ, p 30, 280.

⁴⁰ MNJ, p 84, p 30. It is important to understand that, for Gert, "fully informed" is not an ideal state of complete knowledge about a situation. On page 30 of MNJ, he states that to be fully informed is to "have all the relevant information possessed by rational persons at that time. This does not involve the unattainable ideal of omniscience; on the contrary, it seems likely that most people are fully informed about most of their actions."

⁴¹ Bernard Gert, "Rationality, Human Nature, and Lists," op. cit., p 297. On p 287, Gert states, "I have never met anyone [rational person] who claims that she herself does not avoid the items on the list, or acts in any way differently than someone who does accept the list."

⁴² Bernard Gert, "Precis of Morality: Its Nature and Justification" in *Rationality, Rules, and Ideals: Critical Essays on Bernard Gert's Moral Theory*, edited by Walter Sinnott-Armstrong and Robert Audi, Lanham, Maryland: Rowan and Littlefield, 2002, p 7; and Bernard Gert, "Rationality, Human Nature, and Lists," op. cit., p 282. Hereafter, all references to *Rationality, Rules, and Ideals: Critical Essays on Bernard Gert's Moral Theory* will be cited using the letters RRI, followed by the relevant page numbers.

recognized fact that moral agents always want to avoid harm and significant increases in the risk of harm unless an adequate reason can be given to suffer it. The concept is *normative* because moral agents routinely, but usually subconsciously, use the concept to make moral judgments about the actions of others.⁴³ Gert's account of irrationality *supplies needed content* by providing a list of the basic (avoidable) harms all moral agents want to avoid unless an adequate justification can be given to endure them.⁴⁴ Without supplying needed content, moral theories may be interesting theoretically, but they are not very useful in making moral decisions in concrete cases. While lists of moral rules seem arbitrary to some philosophers, these philosophers must inject content in other places to make their theories useful.

For Gert, irrationality is conceptually more primitive than rationality since "acting rationally requires no more than avoiding acting irrationally."⁴⁵ Irrational actions are easier to describe than rational actions since irrational actions are never advisable. To illustrate, fully informed moral agents would never commit suicide or advise someone they care about to commit suicide because they failed an exam. Committing suicide for this reason is an irrational act. Terminating the psychological pain of failing an exam does not provide an adequate compensating benefit for committing suicide. If I broke my arm, it would be irrational to want the doctor to amputate it to stop the pain. Requesting this treatment would mean that I needed psychiatric therapy.

⁴³ MNJ, p 32. To Gert, when people speak, they do not normally say that someone behaved irrationally; they use other adjectives such as stupid or foolish to convey the thought that someone is behaving irrationally. Using these adjectives does not mean that the words actually mean the same thing in every case.

⁴⁴ In "Rationality, Human Nature, and Lists," op. cit., p 286-287, Gert argues forcefully that lists are necessary to provide content to any moral theory if it is to be useful. To claim that all moral agents want to avoid harm is empty unless harm is defined in terms of a list such as death, pain, disability, etc.... Gert argues that many moral theories use lists implicitly, or they use words like 'normal,' 'ordinary,' and 'common' to avoid the appearance of arbitrariness. Even the words 'moral agents' have to be cashed out in terms of criteria that take the form of a list.

⁴⁵ RRI, p 6. Also, in "Rationality, Human Nature, and Lists," op. cit., p 281, Gert states, "Rational actions share no positive feature or even any significant similarity other than simply being not irrational."

Gert's definition of irrational action includes important qualifications explaining excuses that are subconsciously employed to make moral judgments. People make mistakes; moral agents who accidentally cause harm to themselves or those they care about may be excused if their actions were not reckless or negligent. If moral agents could not reasonably be expected to have enough information to make a fully informed judgment, their actions are not irrational.⁴⁶ Actions facilitated by outside causes such as hypnosis or certain medicines are not irrational. All sorts of actions with unintended consequences are not necessarily irrational. Actions done under severe duress such as running instead of rolling when catching fire are not necessarily irrational actions. And actions done under severe time constraints, which would have been considered irrational if moral agents had sufficient time to make thoughtful decisions are not necessarily irrational actions.

Gert defines rational actions in terms of irrational actions. An action is rational if fully informed moral agents believe that the action does not significantly increase their risk of suffering harms without some adequate compensating benefit. If one or more moral agents might intentionally perform that action or advise someone they care about to perform that action, the action is rational. However, rational actions are not necessarily actions that all moral agents would necessarily do or advise those they care about to do. Rational actions can be either rationally required or rationally allowed.⁴⁷ For Gert, "any intentional action that is not irrational is rational."⁴⁸

⁴⁶ A foreigner who does not know all the traffic laws of another country and subsequently causes himself harm may be excused from judgments of irrationality.

⁴⁷ This is true because most situations present the moral agent with options that persons employing the common moral system think are acceptable. Taking a nap or helping a neighbor paint his house are both rational options.

⁴⁸ CM, p 83.

Most routine actions that moral agents perform are rationally allowed, such as choosing a particular restaurant, an article of clothing to wear, what subject to major in at university, or what car to buy. Taking a drive, reading a book, skydiving, and working in the homeless shelter are all examples of rationally allowed actions. To Gert, these examples "...explain what everyone knows, namely, that in many situations it is rationally allowed to act in any of several different incompatible ways."⁴⁹ The range of rationally allowed actions also includes more controversial issues. The severe pain of some terminal cancers might provide an adequate justification that makes committing suicide rationally allowable. However, not-committing suicide is rationally allowed too for moral agents who rank the harms and benefits differently in the same or relevantly similar circumstances.⁵⁰ It these cases, it is simply false to hold that fully informed moral agents would never or would always commit suicide or advise loved ones never or always to commit suicide. Other examples of rationally allowable actions are plentiful. If I receive a speeding ticket, I believe unjustly, it is rationally allowable to go to court and dispute the fine. It is also a rational option to avoid the trouble, pay the fine, and move on to other pursuits. Even spontaneous actions that are done with no thought at all, like satisfying a sudden urge for chocolate are rationally allowed because they generally do not cause harm to oneself or those one cares about without an adequate justification. Resisting the urge to eat chocolate is also rationally allowed.

Rationally required actions are comparatively rare and, like rationally allowed actions, are also based on the circumstances of particular cases. Actions are rationally required if fully informed moral agents would always perform them or always advise people they care about to perform them. Rationally required actions presuppose that there are no rational alternatives

⁴⁹ RRI, p 6.

⁵⁰ For Gert, the reason that these options (committing suicide or not) are rationally allowable is because both alternatives are options that some fully informed moral agents would act on and would advise those they care about to act on.

available to the agent. If a person is drowning and someone throws her a rescue line, then assuming there are no other alternatives available and the person does not have an adequate justification for wanting to die, then taking the rescue line is rationally required. If a person develops a lethal infection that only one antibiotic can suppress, then taking the antibiotic is rationally required, assuming the medicine is plentiful and no one else would benefit from the agent sacrificing his dosage to save other infected persons. Taking a temporarily painful spinal injection in order to prevent permanent paralysis is rationally required. Giving a doctor permission to set a broken arm is rationally required to a fully informed moral agent who knows that setting the bone is the only way to prevent permanent disability, even if setting the bone causes momentary severe pain.

Generally, rationally allowed and rationally required actions share no features other than the fact that they are actions that fully informed moral agents might do or advise those they care about to do.⁵¹ All rational actions are justifiable, i.e., some fully informed moral agents believe that an adequate compensating benefit is gained from performing that action. A compensating benefit is anything that will increase the probability of avoiding death, pain, disability, loss of freedom, or loss of pleasure, or provide the agent with greater consciousness, ability, freedom, or pleasure. For Gert, a compensating benefit is adequate if any significant group of moral agents regards the harm avoided or benefit gained as making the harm suffered justifiable. A person who is suicidal after failing an exam may want to die to escape psychological pain, but there is no adequate compensating benefit to be had in this particular situation. The harm avoided or the benefit gained in this case do not justifying the harm suffered.⁵²

⁵¹ RRI, p 6. Gert's account of the interplay between rationality and irrationality also makes sense out of activities humans engage in such as acrobatic flying. The pleasure gained compensates for the risk of injury associated with doing this activity under reasonable conditions.

⁵² See MNJ, p 31-85 for a detailed account of what factors complicate efforts to provide a concise definition of a rational action, such as false beliefs. An interesting point I don't investigate until Chapter four is what Gert means by 'significant group.' This issue raises concerns about what makes a group

What counts as an adequate compensating benefit depends on the context. Gert briefly addresses the issue of significant groups and the obvious vagueness of using the phrase to assess the adequacy of compensating benefits.

Whether a belief is a reason is a completely objective matter, but whether a belief is an adequate reason depends upon whether there is any significant group of people who regard it as adequate. Although this vagueness presents some practical problems in determining what counts as an adequate reason, one should not demand more precision in a subject matter than that subject matter permits.⁵³

The fact that most rational actions are only rationally allowed does not entail that all rational options are equally good or preclude moral agents from judging the quality of available rational options. If some fully informed moral agents think an action alternative is justifiable, i.e., provides an adequate compensating benefit for the harm suffered, then the action is rationally allowed.⁵⁴ A person may have a better reason for resisting the urge to eat chocolate rather than for giving in to it. Taking a drive, studying for an exam, or going to the gym are usually rationally allowed, but these alternatives are not necessarily equally preferable in each circumstance. Suppose a person takes a drive in the country but at the same time has the goal of

significant, such as the number that concur or the quality of members, especially in their ability to recognize adequate compensating benefits that turn irrational actions into a rational ones. See Matthias Kettner, "Gert's Moral Theory and Discourse Ethics" in RRI, p 36-40 for a critical discussion of Gert's account of "significant group."

⁵³ MNJ, p 57-58. This quote ties into my comments in footnote 30. I think that, for Gert, the concept of significant group is meant to have practical implications only, in light of the fact that the common moral system is a complex and informal public system. For example, if ten doctors are considering whether a woman's condition merits a hysterectomy, there very well may be disagreement within this group about what the appropriate treatment is. If eight doctors think a hysterectomy is warranted and two do not, then for Gert the group of eight connotes a "significant group," assuming that all ten doctors have relevantly similar expertise and experience.

⁵⁴ Ruth Chang criticizes Gert for not discussing the quality of reasons sufficiently in his description of the common moral system. Chang argues that our concept of reasons holds that an action is not either irrational or rational, but that an action is more or less rational depending on the quality of the reasons provided. Gert disagrees; he says that while giving to Oxfam a better thing to do than buying a new sweater, it is not more rational. Gert does not see a necessary connection between rationality and morality. Some rationally allowed actions, e.g., are immoral actions. Cheating on an important test when no one will find out is rationally allowed but immoral too. See Ruth Chang, "Two Conceptions of Reasons for Action," *Philosophy and Phenomenological Research*, Vol LXII, No. 2, March 2001, p 447-453; and Bernard Gert, "Reply to Ruth Chang," same journal and edition, p 474-481.

becoming a lawyer. The bar exam is in a few days. Driving in the country could be rationally allowed if the drive would increase the probability that she would pass the exam by helping her relax and clear her head. On the other hand, if taking the drive would marginally reduce her chances of passing the exam, then a more rational option would be to spend that time studying. Still, the drive would be rationally allowed since the action is not necessarily an action that no fully informed moral agents would perform or advise those they care about to perform. If, however, taking the drive would significantly increase her chances of failure, taking the drive is irrational. Taking the drive in this case would probably cause the student significant harm without providing an adequate compensating benefit. Fully informed moral agents would never do that act or advise those they care about to do that act.⁵⁵

Gert argues that philosophical attempts to make rationality conceptually primitive have led to counterintuitive results that are avoided when irrationality is made primitive. For Gert, these counterintuitive results are evidence that that attempts to make rationality primitive have failed to describe the common moral system accurately. For example, assume rationality to be primitive and define a rational action as one that maximizes preference satisfaction or aggregate happiness. According to these definitions, taking a drive, reading a book, or working in a homeless shelter would be irrational if those actions did not maximize preference satisfaction or aggregate happiness in a particular context. To Gert, if rational actions are defined as actions that maximize preference satisfaction, all preferences must be counted. Thus, a sadist might be acting rationally when she satisfied her strong preference for harming others. Every fully informed

⁵⁵ Many examples convey that most actions can be rationally allowable but not necessarily equal in stature. For example, if I receive a large bonus from my employer, one option would be to pay for an indigent senior citizen's medication for a year. Another option would be to buy myself a new entertainment system. To Gert, both of these options are rationally allowed, though, clearly, both are not equally good options. Comparing alternatives as better or worse, good or bad does not entail that one option is rationally allowed and the other is not. Only if one thinks that there is a necessary, perhaps symmetrical, relationship between morality and rationality would it be considered irrational to buy the entertainment system. To Gert, there is no such relationship between rationality and morality. Buying a new entertainment system does not satisfy Gert's definition of irrational action, and all actions that are not irrational are, to Gert, rational ones.

moral agent employing the common moral system thinks that sadistic actions are normally unjustifiable. Likewise, if we define rational actions as actions that maximize aggregate happiness, other counterintuitive conclusions result. For example, if more aggregate happiness would result by sacrificing one's life to provide vital organs to other patients, that sacrifice would be rationally required. Every fully informed moral agent employing the common moral system rejects this result as nearly always morally unjustifiable.⁵⁶

For Gert, making rationality conceptually primitive is consistent with moral theories constructed to replace common morality but inconsistent with moral theories intended to describe it.⁵⁷ These replacement theories are largely ignored outside of academia the same way grammarians would be ignored if they proposed changing the way competent speakers of the language speak and judge how other people speak.

Gert's view that irrationality is primitive and his articulation of rational options for action explains an important feature of the common moral system that Gert calls "the complex hybrid concept of rationality."⁵⁸ To Gert rationality is "hybrid" because those reasons that can make irrational actions into rational actions may be egocentric *or* altruistic reasons.

For Gert, actions are irrational for egocentric reasons alone; they cause or significantly increase the risk that moral agents or those they care about will suffer death, pain, disability, loss of freedom, or loss of pleasure without adequate justification, i.e., without an adequate compensating benefit. In contrast, actions are rational and hence justifiable for the compensating benefits they provide, but these benefits (as reasons) can be either egocentric or altruistic. To illustrate how adequate reasons can be either egocentric or altruistic, consider the following

⁵⁶ I briefly mention two theoretical accounts of rational action to illustrate how Gert argues against moral theories that make rationality the primitive normative concept. Gert criticizes several of these alternatives more thoroughly in "Rationality, Human Nature, and Lists," *op. cit.*, p 279-300, and in MNJ p 40-45.

⁵⁷ MNJ, p 18.

⁵⁸ MNJ, p 59.

situation. If a building were on fire, it would be irrational if a person charged into that burning building at great personal risk for no reason. The person would be rationally required to refrain from going into the building. However, if a child was trapped in a burning building, a moral agent would be rationally allowed to attempt to rescue that child, even at great personal risk. This rescue attempt aims to provide an adequate compensating benefit for *someone*; thus, it is rationally allowed. However, it is also rationally allowed to avoid charging into the burning building to avoid the great risk of harm to the *self*.⁵⁹ Both of these options are those that fully informed moral agents might choose since they might rank the harms and benefits at stake differently.

For Gert, people employing the common moral system make judgments about the actions of others using this hybrid concept of rationality. People normally judge actions to be irrational using an egocentric standard. Reasons for action are judged as adequate using either an egocentric or an altruistic standard. The hybrid concept of rationality accounts for and justifies the prevalence of rational options.⁶⁰ People using the common moral system would judge that charging into the burning building and refraining from doing so are both rational options. Donating a kidney to save your child's life or diving on a grenade to save your comrades in an infantry battle are also rational options. Not donating a kidney in the same situation and not diving on the grenade may be rational options also. For Gert, these options are not necessarily morally equivalent, but they are each rational options supported by the hybrid concept of

⁵⁹ This example does not entail that persons do not praise and honor the person who takes certain risks above and beyond those required by professional duties. The firefighter is duty bound to charge into the burning building to try and rescue the child. The fact that we call the action of the bystander who charges in "heroic" or "good" or "brave" does not mean the person who does not charge into the building is morally culpable. No one thinks the person who chooses not to go into the building should be punished, unless it is her professional duty to try and rescue the child.

⁶⁰ MNJ, p 59-61. For Gert theories that only accept egocentric or altruistic reasons for action are counterintuitive for a number of reasons, not least of which is that they eliminate many options that common morality holds to be rational ones.

rationality that is used by moral agents implicitly employing the common moral system to make moral decisions and judgments.

The hybrid concept of rationality also explains another important feature of common morality. Moral agents employing the common moral system generally think that only people who cause harm or significantly increase the risk of causing harm without an adequate justification may be punished. Persons who avoid harm but never act to prevent harm to others or promote good (even for themselves) are rationally allowed to live that way assuming that there is no law requiring or prohibiting such action in particular cases. These persons may rightly be judged selfish or calloused, but they normally do not merit punishment.⁶¹ Almost no thoughtful moral agent normally thinks that people should be punished for failing to charge into a burning building at great risk to oneself to save an endangered child. Thoughtful moral agents agree that unless the person is a firefighter with a duty to attempt a rescue, avoiding the rescue attempt is only rationally allowed, cowardly perhaps, but rationally allowed.⁶²

Gert's hybrid conception of rationality also explains why it is rational for some people to endure great hardship for selfish or selfless reasons. Many young American men are eager to endure significant mental and physical pain to become Navy Seals. Gaining prestige and self-confidence, expressing patriotism, and wanting a strong group identity may all be adequate reasons for wanting to endure this difficult training successfully. These reasons can make a decision to endure this training a rational option because these kudos provide adequate compensating benefits. However, it is also a rational option to avoid Navy Seal training.

⁶¹ Here I assume the "selfish or calloused" person did not have a duty to prevent harm or promote good tied to a social role. An off duty policeman who didn't try to stop a person in his immediate vicinity from being mugged might merit disciplinary action because he has special skills. The presence of "good Samaritan laws" in some societies provides an interesting example of laws that protect moral agents from being sued for trying but failing to help other people in dire need. These laws provide encouragement to moral agents by removing obstacles that might incline moral agents not to help.

⁶² This view assumes, that the person doing these rationally allowable actions is not negligent in performing duties. A mother who left her infant at home alone in order to go skydiving may merit some form of punishment.

For Gert, rationality and irrationality are fundamental concepts employed, usually subconsciously, by moral agents using the common moral system to make moral judgments. Gert argues that making irrationality primitive to rationality provides us with the theoretical machinery to describe the common moral system more accurately than alternatives that make rationality primitive. In addition to rationality and irrationality, Gert argues that a clear account of impartiality is necessary for any accurate description of the common moral system.

Impartiality

To Gert, any accurate description of the common moral system requires a useful account of the role of impartiality. Gert bluntly states, "There is universal agreement that moral rules [that prohibit causing harm without adequate justification] must be obeyed impartially."⁶³

Gert defines impartiality as follows. "A person is impartial in respect *R* with regard to group *G* if and only if *A*'s actions in respect *R* are not influenced at all by which members of *G* benefit or are harmed by these actions."⁶⁴ This definition specifies that impartial actions are relative to a particular group in a particular way. To Gert, this specification captures how moral agents use the concept of impartiality to make specific moral judgments.

To illustrate the relativity of impartiality when employed in a concrete case, consider the role of judges at athletic events. A judge at an ice skating competition has a duty to be impartial with *respect* to accepted criteria for judging skating routines with regard to the *group* of skaters

⁶³ CM, p 6. Gert did not always incorporate an account of impartiality into his description of the common moral system. In his first effort to describe the common moral system, *The Moral Rules*, New York: Harper and Row, 1970, Gert does not even mention the concept. In that book, he used the technical term "publicly advocate" to do the work impartiality accomplishes in the common moral system. He later realized that coining a technical term to account for impartiality was unnecessary and confusing. See MNJ, p 153. Gert is not the only philosopher to substitute a technical term for the common moral employment of impartiality. Alternatives like the Golden Rule, the categorical imperative, the veil of ignorance, and reversibility have been used to account for, or replace, the concept of moral impartiality as it is employed in common morality. Gert criticizes these alternatives briefly in MNJ, p 146-147.

⁶⁴ B. Gert, C. Culver, K.D. Clouser, *Bioethics: A Return to Fundamentals*, Oxford, 1997 p 31. Hereafter, all references to this work will be cited with the letters 'BRF' followed by the relevant page numbers. Also see MNJ, p 152-153, and RRI, p 8.

engaged in that competition. An impartial skating judge will rank skaters according to specific criteria, irrespective of which skater is benefited or harmed by her professional judgment.

However, judging impartially does not prohibit the judge from being partial with respect to other preferences such as liking one skater's costume more than another's, as long as the judge does not let these preferences influence her judgments of the skating performances. Additionally, being an impartial skating judge does not entail that all impartial rational people will necessarily agree with her interpretation of the criteria for excellent skating. A different judge may rank competitors differently. One judge may place more weight on artistic expression over athleticism but do so impartially within the parameters of the rules.

Professional judgments in the workplace that affect specific groups are similar to the way judges gauge performance at athletic competitions. When U.S. Air Force squadron commanders must select navigators for crucial nighttime bombing missions, commanders have a duty according to regulations to choose navigators according to objective criteria such as availability and qualifications. Commanders must choose impartially from within limited *groups* of available navigators under their command with *respect* to applicable rules and regulations. For squadron commanders, choosing navigators impartially does not preclude being partial with respect to opinions about a particular navigator's private lifestyle or taste in music, as long as these preferences do not cloud the commanders' professional judgment.

Gert discusses a few distinctions that clarify what it means to be impartial when making judgments. Acting impartially does not entail treating all like cases alike.⁶⁵ Suppose a skating judge decided to alternate between preferences for artistic expression and athleticism when judging different skating meets. This judge would be acting impartially as long as she judged without concern for who was harmed or who benefited from her judgments. Even if the judge decided in the middle of a skating competition to switch from a preference for artistic expression

⁶⁵ MNJ, 132.

to a preference for athleticism, she would still be acting impartially as long as she was not influenced by which skaters were harmed or benefited from her judgments. Even though the judge's actions make it difficult, perhaps impossible for skater's to have reasonable expectations as to how they will be evaluated, the judge behaves impartially.

For Gert, acting impartially does not require acting consistently either. If the skating judge changed her judging standards every time she heard a baby cry, then she would still be judging impartially as long as her decision to change standards did not depend on who was harmed or benefited. She would be accurately described as a bad judge, but not because she was partial. Good judges are both impartial and consistent.

Impartiality is not conceptually related to rationality. Irrational and rational people both act with impartiality during most of their lives. For example, if a demented person and a rational person are not killing anyone at time T, then these people are at that moment being impartial to the *group* that includes everyone with *respect* to killing. The status of their rationality is irrelevant to their impartiality. Irrational and rational people may also behave partially. If this demented person has an obsession with inflicting pain on himself but not on other people, then he behaves partially but irrationally to himself with respect to causing pain. If a rational person always chooses selfish reasons for action, she acts partially to herself with respect to her reasons for action. A rational person can also try to act altruistically. But even consistently altruistic agents act partially, since decisions about whom to be altruistic towards are directed at someone or some group in a certain respect, at the exclusion of other possibilities.

Gert makes a crucial distinction between impartiality and moral impartiality. This is important since Gert's definition of impartiality obviously does not eliminate discriminatory actions that moral agents judge to be immoral. If an employer discriminates, e.g., against brunettes and only hires blondes to work in her business, she treats the *group* consisting of blondes impartially with *respect* to hiring employees. Likewise, even members of the Nazi party

act impartially when they treat the group consisting of Aryans preferentially with respect to political promotions, as long as they are not concerned with which Aryans are harmed or benefited from those actions. Gert eliminates these entailments by distinguishing impartiality from moral impartiality. For Gert, *moral* impartiality necessarily includes treating a specific *group* "that includes oneself, one's friends and family, and at least a minimal group containing all moral agents and former moral agents who are still conscious" impartially with *respect* to moral rules that prohibit causing harm or significantly increasing the likelihood of causing harm without adequate justification.⁶⁶ Moral impartiality requires making no exceptions for members of *group* smaller than the group protected by the moral rules, such as one's religious group, national group, or racial group, or being influenced with *respect* to rules that all fully informed moral agents would not accept. Members of the Klu Klux Klan may be impartial with respect to Caucasian Protestant Christians of European decent, but they are not morally impartial. Racists restrict the protected group using criteria that all fully informed moral agents using only rationality required beliefs would not necessarily accept, i.e., Caucasian Protestant Christians of European decent.

In practice, moral impartiality is satisfied by simply not performing any specific action that causes unjustifiable harm. Sitting on the couch normally satisfies moral impartiality, as does going to the market. Neither of these actions normally causes harm to any moral agent. For example, one of Gert's moral rules prohibits causing pain without an adequate compensating benefit.⁶⁷ Sitting on the couch or going to the market normally does not cause anyone pain.⁶⁸ In

⁶⁶ MNJ, p 153. Gert restricts the group to these categories because he thinks that these categories are those that all moral agents would agree should be included. Animals, e.g., and even fetuses, are not a part of this minimal group.

⁶⁷ MNJ, p 111.

⁶⁸ This feature explains why people employing the common moral system generally reject making actions that prevent harm into moral obligations. If this were the case then people would be morally guilty at almost every moment of the day of failing to prevent some harm it could be in their power to prevent. As a practical matter, it is impossible to order one's life so that every action accomplishes the goal of preventing harms. We do however call people 'good' who exceed expectations imposed by moral requirements and do

this case moral impartiality is satisfied. The couch sitter causes no pain to the *group* consisting of all moral agents; with *respect* to causing an unjustifiable harm (pain) that all fully informed moral agents want to avoid.

Moral impartiality only concerns positive actions in cases where moral agents have duties to perform, laws to obey requiring action, or have made promises that require action. In my burning building example, firefighters on the scene have a duty to try and rescue the child trapped inside. The firefighters' rescue attempts are morally impartial as long as the firefighters act with respect to the rules of their profession towards the group that includes everyone threatened with harm by fire in their districts. Doctors have a duty to be competent in practicing medicine to anyone they treat with respect to morally accepted and legally mandated practices of medicine.

While not causing harm satisfies moral impartiality, voluntary actions that *prevent* harm are never morally impartial; they always help particular people or groups at the exclusion of other possibilities. Stopping a mugger from assaulting another person is a partial action because that act is specifically concerned with who is harmed or benefits from the action. A person stopping a mugger could just as easily care more for his own safety and choose not to help the victim in order to avoid an increased probability of suffering harm in the rescue attempt. Or consider once again the case of charging into a burning building at significant risk to oneself to rescue a child. This action is rationally allowable but necessarily partial (for the bystander) since the agent acts with a specific interest in who is harmed or benefits in that situation. The rescuer could just as easily have chosen the rationally allowable option of trying to save a different person in the building. Or the rescuer could have chosen the rationally allowable option of preserving his own life and not rescue anyone.

prevent some harm in the course of their activities and who make sacrifices to ease suffering. We do not call 'good' persons who cause no harm; these people do what they are expected to do.

All voluntary actions that *prevent* harm that do not also classify as professional duties or fulfill duties associated with social roles (like parenting) are partial actions. Even if voluntary actions that prevent harm are selected randomly, those actions are partial actions. All voluntary actions that prevent harm do so for some person or group at the exclusion of some other person or group that is also protected by morality. Moral impartiality only concerns not causing harm. It is usually possible at any given time not to cause anyone protected by morality harm at that time. It is impossible at any given time to prevent harm for everyone protected by morality at that time.

Although the distinction between impartiality and moral impartiality eliminates discriminatory practices, the distinction does not eliminate all disagreement about the group protected by the common moral system. For Gert, it is simply a fact that moral agents have legitimate disagreements about who should be included in the minimal group protected by morality. Gert's definition of moral impartiality excludes neonates and human fetuses from the minimal group while including agents who have lost their rationality for some reason, such as disease or accident.⁶⁹ To Gert no philosophical analysis can eliminate disagreements about whether to supplement the minimal group protected by morality; however, he does argue that moral agents cannot legitimately disagree about the members he includes in the minimal group. It is possible that further empirical work will help to clarify who should be added or subtracted to the minimal group.

Moral impartiality restricts the group and the respect in a way that is consistent with the common moral system as an informal public system that all moral agents understand and apply,

⁶⁹ MNJ, p 141, 145. This position is controversial and Gert does not deny it. He admits he cannot prove that potential moral agents (young children, fetuses, neonates) should be added to the minimal group protected by moral impartiality. Those persons with the best chance of becoming moral agents are generally included. Most moral agents include reasonably healthy young children who will shortly become moral agents. Disagreement grows with groups such as viable fetuses and neonates who are severely deformed or retarded. Judgments about who should be included in the minimal group have evolved over the years. For example, where slaves were once excluded, now it is nearly universally accepted that slavery status is not a legitimate criterion for exclusion from the minimal group protected by morality. Some thoughtful moral agents want to include sentient creatures to the list.

implicitly and with varying levels of effectiveness, to make moral decisions and moral judgments. That moral impartiality is generally satisfied by not causing harm shows a clear connection between moral impartiality and the moral rules.

Publicity

In order to provide an adequate account of Gert's ten moral rules and the associated ideals and virtues, it is important to explain what role the concept of publicity plays in Gert's description of the common moral system. Gert's discussion of publicity focuses on two related issues. First, the common moral system is an informal *public* system.⁷⁰ Second, a test of what counts as a moral rule or an adequately justifiable violation of a moral rule depends on whether that rule or violation would be *publicly allowed*.⁷¹

For Gert, a public system is a guide to behavior with two features. Everyone the system applies to, i.e., everyone whose behavior is guided and judged by the system understands the system and the actions it requires, prohibits, permits, and encourages.⁷² Next, it is not irrational to want to be guided and judged by that system. The common moral system is such a public system. The common moral system is a system where moral agents understand what the system requires, prohibits, allows, and encourages, and is a system that it is not irrational for moral agents to accept as guide for their behavior.⁷³

If everyone to whom the common moral system applied did not understand (usually implicitly) what that system requires, prohibits, permits, and encourages, then the system would not be a *public* system. Moral knowledge would be esoteric, restricted to experts like

⁷⁰ MNJ, p 10-11.

⁷¹ MNJ, p 15.

⁷² The common moral system applies to moral agents.

⁷³ Bernard Gert, "Morality, Moral Theory, and Applied and Professional Ethics," op. cit., p 10-11; CM, p 9; and MNJ, p 109.

philosophers and cognitive scientists. Moral accountability would also be restricted to those people who had this special knowledge. No moral agent relying only on rationally required beliefs thinks this view describes the common moral system correctly. All moral agents are responsible for their moral decisions and judgments. All moral agents know that activities like killing and cheating are immoral unless an exception is justifiable by the particular circumstances. No moral agent needs a moral expert to understand that these activities are immoral.

To understand what Gert means when he says that morality is an informal public system, it is helpful to compare the moral system to games. Games are public systems; some games are informal public systems. People who play games understand that games have goals and are governed by rules. An official basketball game is a formal public system because a referee enforces the rules. A friendly game of pinochle is an informal public system; players at least implicitly know the basic rules and agree to enforce them informally with each other. If a player does not want to play by the rules, or does not want to play pinochle for some other reason, he can walk away. The common moral system is an informal public system the way a friendly game of pinochle is an informal public system. There are normally no official moral judges that serve as moral referees. Unlike games however, the common moral system is not a system that moral agents can avoid. Moral agents are necessarily guided by the common moral system the same way they are guided by a grammatical system when they speak a language and judge how other people speak that language.⁷⁴

And yet, people who are competent pinochle players or competent moral agents probably cannot explain *all* of the rules of those public systems accurately. Most likely, these people have

⁷⁴ Bernard Gert, "Morality, Moral Theory, and Applied and Professional Ethics," op. cit., p 10-11; and MNJ, p 10-11.

learned to play pinochle and learned common morality from teaching, observing and doing.

Their understanding of pinochle and the common moral system is implicit.⁷⁵

For Gert, universal moral rules are those rules that all impartial moral agents using only rationally required beliefs would publicly allow, i.e., all impartial moral agents would publicly accept being guided by those rules and want others to do the same toward them and those that they care about.⁷⁶ Similarly, a proposed violation of a moral rule is *publicly allowed* if it is justifiable using a decision procedure that all moral agents would publicly accept and want others to publicly accept.⁷⁷ For Gert, a moral rule and a decision procedure used to assess proposed violations of moral rules, which all impartial moral agents could not accept, would not be part of a *public* system. Thus, a moral rule and a decision procedure must be clear, simple, and avoid using technical language so that it can be understood and accepted by all moral agents.

To Gert, the common moral system is justifiable by using only rationally required beliefs that all moral agents would publicly accept. A rationally required belief is a belief that it would be irrational not to accept. For Gert, the rationally required beliefs relevant to morality are general beliefs about all human beings.⁷⁸ Chief among these beliefs are that human beings are vulnerable and fallible. All moral agents know that they can be disabled, killed, made to suffer pain, and be deprived of freedom and pleasure. And all moral agents know that people make mistakes that can cause themselves and other people harm.⁷⁹ The universal moral rules are rules

⁷⁵ MNJ, p 4, 239.

⁷⁶ MNJ, p 126. That all moral agents would publicly accept these rules is important because it provides a way to explain hypocrisy. Moral agents would publicly accept the moral rules but would not necessarily want to do so. Putting up a public front of acceptance, however, is crucial, since a moral agent who publicly announced his intention to be hypocritical would invite harms on himself that, absent an adequate reason, he wants to avoid.

⁷⁷ MNJ, p 151. I discuss Gert's two-step decision procedure in a later section.

⁷⁸ There are many rationally required beliefs that are not necessarily connected to morality. For example, it is rationally required for humans to believe that they cannot fly like birds.

⁷⁹ MNJ, p 36-37; CM, p 71.

that prohibit and require actions that cause harms that all moral agents want to avoid unless they are adequately justifiable. These moral rules are therefore rules that all moral agents would *publicly accept*.⁸⁰ To not publicly accept being guided by these moral rules and not want others to be so guided would be irrational. To not publicly accept being guided by these moral rules invites harms that all moral agents want to avoid.⁸¹

According to Gert, violations of moral rules are adequately justifiable if they are made using a decision procedure that all moral agents at least implicitly know and would explicitly accept this decision procedure if it were explained to them. If the decision procedure is not acceptable in this way, it is not a procedure that is part of an informal *public* system. The moral rules *and* the procedure for justifying violations of moral rules must both be part of the informal public system that is the common moral system. Otherwise, violations would not be justifiable in a way that impartial moral agents could publicly accept. Adequately justified violations of moral rules are those that moral agents could favor everyone acting on in all cases that share the same morally relevant features.⁸²

Gert discusses at length a decision procedure that he argues all moral agents would publicly accept as part of the informal public common moral system in the same way the universal moral rules are a part of the informal public common moral system. For Gert, violations of moral rules are not simply justifiable or unjustifiable according to a decision procedure. It is a fact that moral agents disagree about the justifiability of proposed violations of moral rules. To account for the fact of disagreement, Gert groups proposed violations of moral

⁸⁰ MNJ, p 151. Gert makes a strong claim when he says that the moral rules and decision procedure are those that impartial moral agents would publicly accept. Since all moral agents want to avoid certain harms for themselves and those they care about, rules listing these harms will be publicly accepted. To not publicly accept them would be irrational. The decision procedure, for Gert, has to be similarly acceptable publicly in this strong sense.

⁸¹ CM, p 71.

⁸² MNJ, p 151.

rules into three categories: strongly justified, weakly justified, and unjustified. I devote a section to Gert's decision procedure and the relative strength of justifications for moral rule violations later in this chapter and in subsequent chapters.

Moral Rules

All humans are vulnerable to the harms of death, pain, disability, loss of freedom, and loss of pleasure. Moral agents universally want to avoid these harms. For Gert, the moral rules that he lists are universal since they are necessarily connected to harms that all moral agents want to avoid. These universal moral rules prohibit causing or increasing the probability of causing these harms. Any proposed moral rule that is not grounded in harms that all fully informed moral agents want to avoid is not a universal moral rule.

Gert's universal moral rules are part of the informal public system that is the common moral system. All moral agents implicitly know and understand these rules. For Gert, these rules consist of a list of ten prohibitions and requirements that all agents who want to avoid death, pain, disability, loss of freedom, and loss of pleasure and who are responsible for their actions, are morally obligated to obey. Since the universal moral rules are conceptually related to the harms that all moral agents want to avoid, the moral rules are rules that all moral agents who use only rationally required beliefs, such as "All people are vulnerable," and "All people are fallible" would publicly accept as a guide for their behavior. The moral rules are rules that all impartial moral agents would accept being guided by, and rules that all impartial moral agents want other moral agents to obey with regard to themselves and those they care about.

For Gert, the universal moral rules are "explicitly and implicitly used when a person is making moral decisions about how to act and making moral judgments about how others have acted."⁸³ Gert lists the following ten universal moral rules.

⁸³ MNJ, p 157.

- | | |
|--------------------------------|---------------------------------|
| 1. Do not kill. | 6. Do not deceive |
| 2. Do not cause pain. | 7. Keep your promises. |
| 3. Do not disable. | 8. Do not cheat |
| 4. Do not deprive of freedom. | 9. Obey the law. |
| 5. Do not deprive of pleasure. | 10. Do your duty. ⁸⁴ |

Gert's list of moral rules prohibits two categories of intentional actions. The first five rules prohibit actions that cause direct harm. The second five prohibit or require intentional actions that would indirectly cause harm if individual violations were made into general practices. The harms indirectly caused by violations of the second five rules are the same harms explicitly stated in the first five rules. For example, the widespread breaking of promises normally causes death, pain, disability, loss of freedom, or loss of pleasure. Usually broken promises cause mental pain.⁸⁵

Gert agrees with Mill that, "No moral agent living in a society is ignorant of the basic general moral rules."⁸⁶

To Gert, the moral rules are easy to memorize and use as guides for making moral decisions and judgments. In most cases these rules are trivially easy to obey. These rules alert

⁸⁴ CM, p 16. Although Gert lists these rules in many articles and books, one good question worth raising at this point is why Gert does not include a prohibition against stealing in the list of universal moral rules. For Gert, stealing is not included in the list because it is possible that some societies may not have the institution of private property, making stealing an action that does not apply universally, and is not known and understood (necessarily) by all moral agents at all times, places, and cultures. See MNJ, p 112-113, 198-199. He also argues that in societies where stealing is prohibited, there are normally laws in place to prohibit stealing. Thus stealing would be covered by the moral rule "Obey the law." Although I do not know whether there are human societies where there is no private property, Gert's point here seems intuitively implausible. I cannot imagine that there actually is a society where there are no things that are implicitly earmarked for certain people, such as someone's shoes or a set or prescription sunglasses. There is also another way to look at stealing that I think makes Gert's view problematic. Suppose a society lives in a commune and agrees to have all their goods in common. Would it not be possible to steal public property too, such as sneaking food from public stores that are above and beyond one's allocated rations? I think so. Thus, it seems to me that stealing would apply in every society in some form or another. Even without the support of law, it is arguable that stealing ought to be considered a universal moral law.

⁸⁵ A particular broken promise may, but does not necessarily cause harm. The practice of promise breaking always causes harm. In both cases, the harms caused are those harms listed in the first five moral rules.

⁸⁶ CM, p 18. In *Utilitarianism*, chapter 1, paragraph 3, Mill also describes how moral agents generally accept the same moral rules. Mill refers to these moral rules as "moral laws." See John Stuart Mill, *Utilitarianism*, edited by Roger Crisp, New York: Oxford University Press, 1998.

moral agents if some action they are considering needs to be justifiable before it may be considered morally required or permitted.⁸⁷

The moral rules also alert moral agents to actions that *may* deserve punishment if these actions are not adequately justified.⁸⁸ For example, moral agents know that killing other people is normally a serious breach of morality and that people who kill without adequate justification merit punishment. Moral agents know and understand that killing people to steal their money is normally unjustifiable and deserves punishment unless it is adequately justifiable by the facts of a particular situation. Most moral agents know that killing an unarmed person that one catches stealing one's lawnmower is normally inadequately justifiable and probably merits punishment, though people might disagree on what type and degree of punishment the action warrants. All moral agents know that if a victim kills a violent mugger in self-defense, this act of killing in those circumstances is normally justifiable and should exempt the victim from a liability to punishment.

If Gert's theory were reduced to a single rule, it could be captured in the command "Do not cause harm without an adequate justification; help where you can." However, this command provides little moral guidance without providing an explicit account of harm. The principle "Do not cause harm without good reason; help where you can," like all moral principles, is a relatively useless platitude unless the concepts are explained and content is provided. Gert's universal moral rules provide content in the form of a useful, easy to understand list. To Gert, without lists to make the content of general moral principles explicit, moral principles are slogans.⁸⁹ Although

⁸⁷ CM, p 16. Gert gives an exhaustive account of a procedure for justifying or excusing violations of moral rules. I treat the issue of justifying violations in a later section.

⁸⁸ I highlight the word 'may' here because not all unjustified violations of moral rules perpetrated by moral agents ought, necessarily, to be punished. If punishing people for a brief riot will start a civil war, punishing the rioters isn't recommended.

⁸⁹ For a nice explanation of this need for content, see Bernard Gert, "Rationality, Human Nature, and Lists," *op. cit.*, p 286-287. For a discussion of slogan morality, see Gert's "Morality Versus Slogans," *Western Michigan University Center for the Study of Ethics in Society*, Vol. 3, No. 2, December 1989,

most moral theorists eschew lists as arbitrary, Gert asserts that moral theories need lists to make them useful as a guide for making moral decisions in concrete cases. Gert provides a list in part because he wants to describe the common moral system in way that makes his theory accessible and useful for making moral decisions and judgments in concrete cases. Gert does not object to broad moral principles; he just thinks that alone they are insufficient for providing moral guidance for moral agents in making actual moral decisions and judgments.

Actions that violate moral rules without adequate justification can be both irrational and immoral, or rationally allowed but still immoral. Committing suicide for a trivial reason is usually irrational *and* immoral since it normally causes unjustifiable harm to a moral agent. Breaking a promise made to someone the agent does not care about in order to spend extra time doing a fun activity with someone the agent does care about may be rationally allowed *and* immoral if the promise-breaker or a loved one is not harmed by the violation and breaking the promise provides an adequate compensating benefit for the promise breaker and/or those he cares about. Though all fully informed moral agents want promises made to themselves and those they care about to be honored, all fully informed moral agents do not always want to keep the promises they make. Many moral agents are hypocritical.⁹⁰ Hypocrisy is rationally allowed and immoral; to declare one's disregard for morality would invite distrust and other actions and attitudes that cause harm to the agent who does not want to fulfill moral obligations. If a person does not want to act morally, then pretending to want to act morally is a rationally allowed strategy. However, hypocrisy is immoral because it normally leads to actions that violate moral rules without adequate justification.

reprinted in *Morality in Criminal Justice*, edited by Daryl Close and Nicholas Meier, Wadsworth, 1995, p 51-60.

⁹⁰ MNJ, p 9, 169.

For Gert, successfully violating moral rules is not necessary for an action to be immoral. An attempt to intentionally harm someone that fails is also immoral, provided the attempted action is not justifiable, i.e., there is no adequate compensating benefit for the action that was attempted. Attempted murder that meets this condition is an immoral action. Attempted deception that is discovered is an immoral action as well.⁹¹ Attempted violations of universal moral rules are not actions that moral agents using only rationally required beliefs would publicly allow. Publicly allowing attempted violations of moral rules increases the probability that other unintended yet unjustifiable harms that all moral agents want to avoid will be caused. An unjustifiable attempted murder that fails might cause unjustifiable injury or disability as well.

Every violation of the first five rules necessarily causes harm, but not every violation of the second five rules necessarily causes harm. However, widespread violation of any of the second five rules nearly always causes harm or increases the probability that harms will result.⁹² To illustrate, it is possible to cheat on a test so that no one would find out. It is also possible that this cheating would get someone into medical school, and that the cheater would eventually become a physician who prevented a great deal of harm in later professional life. Cheating in this case might even be rationally allowed; cheating without adequate justification does not necessarily harm oneself or others that one cares about. However, if people knew that they were allowed to cheat, then many more people would cheat and much unnecessary harm would result. Moral agents know they are vulnerable to harm and they want morality to proscribe actions that

⁹¹ CM, p 16.

⁹² MNJ, p 202. Not every instance of breaking the law causes harm, such as running a red light in the middle of the night. Rampant lawbreaking, however, always causes the harms listed in the first five rules. This last statement, for Gert, is only true if the law prevents sufficient harm such that all moral agents would publicly allow the law as morally required. The law against running red lights is such a law. While moral agents understand that there are justifiable exceptions to this law, all moral agents know that rampant disregard for this law would cause great harm. Other laws that are evil laws are not laws such that rampant breaking of that law would cause great unjustifiable harms. Consider the slavery laws in the American South prior to 1865 and the civil disobedience performed by moral agents working in the Underground Railroad. Rampant civil disobedience by Underground Railroad workers did not cause great harm because the laws they broke were evil laws.

are *likely to increase* the probability that they will be harmed, not just activities that cause harm directly. A description of common morality that publicly allowed cheating would be an inaccurate description.

Gert asserts that testing the adequacy of these general moral rules is like testing the adequacy of the axioms of logic or mathematics. Axioms are really axioms if they yield only true theorems. Likewise, the moral rules may be tested to see if they include only those rules that are clearly moral rules and omits rules that clearly are not. To Gert, the moral rules he lists are basic; every moral agent wants to avoid the harms that violating these rules causes or generally causes if disobedience is widespread.⁹³ To Gert, no fully informed moral agent would deny that these rules are used to make moral decisions about one's actions and moral judgments about the actions of others.⁹⁴

People normally obey every moral rule passively while they are sleeping or going about their business, assuming that these people are not shirking a duty, breaking a promise, or breaking the law. Hence, it is not necessary that people consciously act for the sake of moral rules, only that people act in accordance with them as they live their lives. Moral agents rarely think about the moral rules, and they do not need to. Writing this sentence is a case in point. This action violates no moral rules, and I am not consciously thinking about the moral rules as I write.

Particular Moral Rules

Gert's analogy of moral rules to the axioms of logic and mathematics has the implication that the list of moral rules can provide assistance in making reliable moral decisions and

⁹³ MNJ, p 110. This may explain why Gert has chosen a nice round number like ten moral rules. In logical systems, too few axioms are too burdensome to use efficiently for doing derivations. Too many rules are difficult to memorize and keep straight in one's mind.

⁹⁴ MNJ, p 158. Gert shows the same humility that W.D. Ross showed when he argued that his list of six *prima facie* duties was not necessarily an exhaustive list either. For example, some people such as myself think that one of the universal moral rules ought to be "Do not steal." Gert acknowledges this issue as a matter of interpretation. The prohibition against stealing, Gert thinks, is covered by the law in most societies. For Gert, the rule "Do not steal" is normally covered by the universal moral rule, "Obey the law."

judgments in specific cases.⁹⁵ To Gert, when the general moral rules are considered in conjunction with circumstantially relevant facts, the general moral rules can be used to form particular moral rules. Particular moral rules are like the universal moral rules except that particular moral rules do not apply to all moral agents.⁹⁶ In the United States, the universal moral rule "Do not cause pain" combined with the activities of the medical profession indicates that performing nontrivially painful medical procedures on patients without effective painkillers is immoral if these painkillers are available and the use of these drugs would not cause or significantly increase the likelihood of causing some other more significant harm to patients. In this case then, the universal moral rule "Do not cause pain" may be used to form a culturally relative particular moral rule, "Doctors, do not cause nontrivial pain to your patients if effective painkillers are available." This particular moral rule is consistent with the universal moral rule.⁹⁷

Since Gert's ten moral rules may be combined with concrete circumstances to yield particular moral rules, they can be used to evaluate the legitimacy of existing professional rules and codes, and can and should be used to generate professional rules and codes of conduct consistent with the common moral system.⁹⁸ Consider the legal profession. Since deception without adequate justification is immoral, the legal profession should articulate particular professional rules that clarify when deception in the legal profession is prohibited, allowed, or even required as a professional duty. Articulating particular rules concerning deception in the

⁹⁵ The disanalogy here that is important is that, deriving theorems from axioms, moral decisions are not "derived" from the universal moral rules.

⁹⁶ MNJ, p 113.

⁹⁷ MNJ, p 112. This particular rule clearly does not apply to all moral agents, such as during the whole of human history prior to the development of medicinal painkillers.

⁹⁸ Bernard Gert "Moral Theory and Applied Ethics" *The Monist* Vol 67, No 4, Oct 1984. In this earlier article, Gert refers to the moral rules as a code of conduct. On page 533, Gert says his theory is "...one version of that group of theories which view morality as a code of conduct that would be advocated by all rational persons." If the moral rules are a code of conduct, then these rules can combine with professional circumstances to yield professional codes, in addition to other rules, regulations, and policies in the profession.

legal profession provides content and thus crucial guidance for what it means to practice law morally, i.e., consistent with the moral rule "Do not deceive." Articulating professional rules and codes includes making explicit those duties that require legal professionals to prevent unjustifiable harms that all moral agents want to avoid.⁹⁹

For Gert, the relationship between universal and particular moral rules is crucial if his description of the common moral system is one that will be useful for making moral decisions in cases embedded within, e.g., a culture, institution, or practice. About this relationship Gert states,

Particular moral rules share the essential formal feature of general moral rules, they apply to all persons who know them and can both obey and disobey them, but unlike the general moral rules, this does not mean that they apply to all rational persons.... It must, however, be possible to show that all violations of particular moral rules are also violations of general moral rules. Otherwise, the particular moral rules of a society might be completely unrelated to the general moral rules and morality would not be universal.¹⁰⁰

...Yet many particular moral rules in every culture are formed around these various objects, technologies, institutions, and practices that differ from one culture to another. Those moral rules, in effect, are proscribing the causing of the same list of harms that are proscribed by the general moral rules.¹⁰¹

For Gert, violations of particular moral rules always cause or increase the probability of causing the same harms proscribed in the universal moral rules. Particular moral rules are morally required to anyone for whom they apply. However, unlike the universal moral rules, particular moral rules do not apply to everyone.¹⁰² Consider the moral rule "Do not cause pain," which includes both mental and physical pain. To Gert, this rule, combined with the traditions and sensitivities of public dining in the United States, yields a particular moral rule such as, "Do not intentionally belch at the dinner table." Belching while dining is offensive to most U.S.

⁹⁹ Since Gert argues that moral agents use the common moral system implicitly like they use the grammatical system, some relationship between the universal moral rules and professional codes already exists. The relationship may be haphazard.

¹⁰⁰ MNJ, p 113.

¹⁰¹ BRF, p 9.

¹⁰² MNJ, p 113.

diners, but it may serve as an appropriate public compliment in Japan or India to Japanese or Indian chefs and hosts. This example illustrates that, while offending causes mental pain and is proscribed by the moral rules; offense is given in diverse ways in different cultures.¹⁰³ Gert sums it up this way.

Only the general moral rules are universal because they involve no beliefs which are not universally held and no practices which are not universal. The rules generated by blending the general moral rules with characteristics of a particular culture are not universal, for they involve beliefs held by those in that culture and practices which may be limited to that particular culture.¹⁰⁴

Consider another example. The particular rule "Do not drive an automobile on the right side of the road" is a particular moral rule in Great Britain but not in the United States. The particular moral rule "Do not drive an automobile on the right side of the road" is a particular moral rule because failing to obey that rule in Great Britain is also failing to obey the universal moral rule "Obey the law." It also greatly increases one's chance of causing significant pain, disability or death to oneself or others, which violates several other moral rules.

Violating particular moral rules can also be irrational. To drive on the right side of the road in Great Britain for no justifiable reason significantly increases one's risk of great harms and provides no adequate compensating benefit. No rational moral agent would drive this way in Great Britain or recommend that those they care about ever drive this way.

Gert's view that particular moral rules are inseparably linked to general moral rules leaves many applications open to interpretation that are a potential source of irresolvable moral disagreement. If causing offense violates the moral rule "Do not cause pain", then many actions, such as men wearing earrings or long hair in the United States are *prima facie* immoral since those actions offend or annoy some moral agents in that society. Analogously, it would be *prima facie* immoral to take many medical treatments that most moral agents intuitively accept as

¹⁰³MNJ, p 112; BRF, p 52-54.

¹⁰⁴BRF, p 53.

morally permissible. It would, e.g., be *prima facie* immoral for some patients with terminal cancer to refuse life-prolonging treatment if that decision causes distress to other moral agents in the society, particularly other family members.¹⁰⁵

In these cases, Gert's argues consequentially. For Gert, the harms caused by prohibiting the wearing of earrings, a certain hairstyle, or denying life-prolonging treatments for terminal illnesses outweighs the offense caused by maintaining personal liberty to make these choices.¹⁰⁶ Even something as simple as wearing a hat indoors or biting one's fingernails really irritates some people. In most situations to morally prohibit these actions would cause much more harm than it prevents.¹⁰⁷ Allowing some offensive actions is therefore justifiable when consequences are considered. For Gert the appropriate way to make moral decisions in these cases is to ask the morally decisive question, "What effects would this kind of violations being publicly allowed have?"¹⁰⁸ For Gert, the answer to this question is used to determine if a violation, in this case an offensive behavior, is justifiable or unjustifiable, and if it justifiable, if it is weakly or strongly justifiable. While a few moral agents might disagree, people are harmed less by tolerating some expressions of personal freedom that are offensive than by constraining people to act so as to offend no one.¹⁰⁹

¹⁰⁵ BRF, p 54.

¹⁰⁶ Of course, to Gert people can disagree on their estimates of the consequences of publicly allowing a behavior and the consequences of not publicly allowing the behavior. For Gert, only empirical work can resolve these estimates, if they are resolvable at all.

¹⁰⁷ CM, p 22. Here Gert provides an example of joke telling. If a speaker tells a joke at a large public speaking engagement, there is a reasonable chance the joke will offend someone. Does that mean that such speakers should never tell jokes in these circumstances? Obviously not, though there are implicit etiquette boundaries about what jokes are acceptable where.

¹⁰⁸ MNJ, p 236.

¹⁰⁹ This view is very similar to Mill's view as expressed in *On Liberty*. Of many quotes that reveal this similarity, the following is illustrative. Of human liberty, Mill states, "All errors which he [man] is likely to commit against advice and warning, are far outweighed by the evil of allowing other to constrain him to what they deem his good." John Stuart Mill, *On Liberty*, Chapter 4, Paragraph 5, taken from the *Essential*

Interpreting the Moral Rules in Particular Contexts

Societies play a crucial role in how the moral rules are interpreted. For Gert, these interpretations are not arbitrary. Whenever someone acts with the intention of causing harm to another person, that action violates moral rules. All societies, Gert argues, concur that causing intentional harm to another person violates moral rules. To Gert, these are strong interpretations of moral rules, i.e., the obvious violations that all societies would concur are violations.¹¹⁰ Other violations of moral rules are interpreted in different societies and other smaller groups differently, meaning that some groups will interpret an action as violating moral rules and another society will not interpret the same act as violating moral rules. Belching in a restaurant is one example of an action that is interpreted as violating moral rules in one society but not in another society.

Gert clarifies that interpreting the justifiability of many moral rule violations relevant, e.g., to expressions of personal liberties, depends on contextual factors even more fine grained than culture alone. Interpretations of these actions can be complex. For example, in families where persons live in close quarters and spend a great deal of time together, some expressions of personal liberty that are not interpreted as unjustifiable violations of moral rules in larger society may violate moral rules within the family. The consequences bear this out. Some linguistic expressions, dress habits, and hygienic habits that it is better to permit in larger society may be unjustifiable or more weakly justifiable violations of moral rules in a family setting.¹¹¹ When I was a child, if I wore a ball cap to the dinner table in the presence of my grandfather, it angered and offended him. He thought the practice was rude and disrespectful. Wearing a hat at the

Works of John Stuart Mill, edited and with introduction by Max Lerner, New York: Bantam Books, 1961, p 324.

¹¹⁰ An example would be a high school athlete accidentally breaking a competitor's arm in a refereed wrestling match.

¹¹¹ BRF, p 58.

dinner table in front of him not only offended him but also made other family members uncomfortable in that tense environment. It was an unjustifiable or very weakly justifiable violation of moral rules in that setting because it caused more harm than insisting on the trivial right to wear hats at the dinner table in his presence was worth, assuming that exceptional circumstances were not tilting the balance of harms the other way. In contrast, wearing a hat at most casual restaurants today is perfectly okay. If my grandfather wants to eat in a public place then he is expected to be the one to accommodate to these public cultural norms.

The same fine grained interpretation of the moral rules holds in medical contexts. For example, in a situation where a wife is dying and her husband is a committed Catholic, suppose the wife is ambivalent about having last rites administered. In this case, if it causes great distress to the husband to not have last rites administered to his wife, then the wife may be committing unjustifiable or very weakly justifiable violations of moral rules if she declines to have the last rites administered anyway. It may be incumbent on other family members and medical professionals to point this fact out to her so that she is aware of the consequences of her apathy and can make an informed decision.¹¹²

To Gert, the variability of interpreting particular moral rules in fine-grained ways in concrete cases shows that the common moral system he describes is coherent and flexible. He states,

Highlighting the matter of rule interpretation also helps one to see that interpretations can change in different settings. The changes are not *ad hoc* and whimsical; they are appropriate and systematic, explained by the concept of morality as a public system. With regard to interpretations of general and particular moral rules, this theory explains

¹¹² These issues are so complex because moral agents move in and out of various groups with implicit and explicit behavioral rules all the time. This movement through the groups and subgroups within a culture make the issue of offense an interesting moral issue to analyze. For Gert the issues in these examples should be decided by following the two-step procedure. If an offensive action is only weakly justifiable, then the moral agent doing the offending has a decision to make, and must accept the consequences of his or her behavior.

why the domain of actions not covered by a moral rule can contract or expand in different groups and subgroups.¹¹³

Moral Rules in Professions

With regard to professional ethics, Gert argues that many professional rules are also particular moral rules.¹¹⁴ The institutions, practices, and relationships in the professions may be combined with universal moral rules to form professional moral rules. These professional moral rules are always consistent with associated universal moral rules the way other particular moral rules are consistent with universal moral rules. Violating these professional rules therefore always violates universal moral rules. Some professional moral rules are captured in professional oaths and professional codes of conduct, though these rules do not necessarily include all of a profession's moral rules. For Gert, the medical ethics rule "Do not treat patients without first obtaining informed consent" is one example of a professional moral rule that is contained in the medical profession's code of conduct. The rule "Do not treat patients without first obtaining informed consent," Gert argues, is consistent with the moral rule, "Do not deprive of freedom."¹¹⁵

¹¹³ BRF, p 58.

¹¹⁴ While principlism and Gert's theory may both be construed as list theories of morality, Gert's theory improves on principlism by integrating the particular moral rules of the medical profession into a unified but flexible common moral system. In contrast, Beauchamp and Childress spend time at the beginning of their book, particularly the second edition, explaining the moral theoretical alternatives of utilitarianism, deontology, virtue theory, and social contract theory without providing an argument preferring either one. Even at the theoretical level, Beauchamp and Childress imply that medical professionals should decide which moral theory they prefer as if all are coequal alternatives. If this interpretation of the moral theoretical alternatives is true is a separate issue. The authors do not support their view with arguments.

¹¹⁵ BRF, p 10, 62. I discuss this and other relationships between universal moral rules and professional moral rules in medicine in Chapter four. Principles such as the principle of informed consent are expressed as moral obligations in the American Hospital Association's Patient's Bill of Rights approved by the American Hospital Association House of Delegates on February 6, 1973. Other declarations pertaining to specific medical activities like medical experimentation on human subjects oblige medical professionals to obey particular moral rules like "Obtain informed consent." See the "Nuremberg Code" in *Trials of War Criminals before the Nuremberg Military Tribunals*, No. 10, vol. 2, Washington DC: U.S. Government Printing Office, 1949, p 181-182; and *The World Medical Association Declaration of Helsinki*, adopted by the 18th World Medical Assembly, Helsinki, Finland, 1964, and as revised by the 29th World Medical Assembly, Tokyo, Japan, 1975.

As with the universal moral rules, all professional moral rules have exceptions. These exceptions must be justifiable. For Gert, proposed exceptions to professional moral rules, like proposed exceptions to other particular moral rules, are justifiable if at least some impartial moral agents would publicly allow them in that and all cases that share the same morally relevant features.¹¹⁶ If a psychiatrist confines a patient to a mental hospital without her consent or the consent of her legal guardians, that psychiatrist violates the universal moral rules that prohibit denying moral agents of freedom and pleasure. The psychiatrist's actions must be at a minimum weakly justifiable to warrant the confinement, meaning that the significant harms prevented (or the probability that significant harms will be prevented) must adequately justify taking away the agent's freedom in that particular case.¹¹⁷

For Gert, the relationship between the universal moral rules and professional moral rules, such as in the medical profession, is obscured by the fact that professional moral rules are often stated as moral principles. However, for Gert, nothing special turns on whether professional moral rules are phrased in the form of rules or principles. It is a simple matter to take, e.g., the medical ethics principle "Obtain informed consent" and phrase it in the form of a professional moral rule such as "Do not treat patients without first obtaining informed consent."¹¹⁸

Since, for Gert, morality is a public system that all moral agents can know and understand, particular moral rules, including professional moral rules, must be describable in language that all moral agents can know and understand. Otherwise, morality is ultimately not a public system where it matters most, in the institutions, groups, and cultures that structure our

¹¹⁶ MNJ, p 236.

¹¹⁷ If the patient is suicidal, that fact would, absent other mitigating facts, make the confinement decision a decision that at least some impartial moral agents would publicly allow.

¹¹⁸ BRF, p 62-66. Professional rules/principles can be used to formulate even more specific and useful professional rules, such as "Reopen the consent process if the medical situation changes significantly and the patient needs to consider new treatment alternatives in light of new facts."

daily lives. Thus, describing professional rules should also exclude barriers to comprehensibility such as obtuse medical jargon.¹¹⁹

Other Professional Rules

Gert is careful to point out that professions have many rules that are not professional moral rules. These other rules serve a variety of purposes. Some of these rules serve general moral goals, others serve special goals of members of the professions, and still others reinforce a positive public image of those professions in the eyes of the profession's clients.¹²⁰ Most of these rules generally encourage professionals to strive to exceed the minimum standards of their profession. It is important to distinguish different types of rules in the professions since different rule types are related to the common moral system differently.

To Gert, some of these other professional rules acknowledge human weaknesses and attempt to minimize temptations to violate professional moral rules. Gert says that these rules have the goal of minimizing "moral hazards."¹²¹ These rules are usually stated in regulations and codes. For example, after retirement or separations from military service, government contracting officers are prohibited from working for government contractors they have done business with on behalf of the government. This rule avoids the "moral hazard" of conflicts of interest that might undermine impartiality in awarding lucrative defense contracts.¹²² In the medical profession, one example of a similar professional rule meant to avoid "moral hazards" would be the rule prohibiting psychiatrists from casually associating with their patients. This rule

¹¹⁹ BRF, p 16-18.

¹²⁰ BRF, p 66.

¹²¹ BRF, p 67.

¹²² These rules are discussed in the *Code of Federal Regulations* (48 CFR 3.104-1 – 11), Washington DC: U.S. Government Printing Office, October 1, 1998.

is meant to minimize the temptation to violate professional moral rules such as the rule that prohibits forming intimate relationships with one's psychiatric patients.¹²³

For Gert, other professional rules are designed to improve or maintain the positive reputation of the profession in the eyes of the public. In the medical profession, examples of these rules might be exhortations to do volunteer medical screening in poor communities or to occasionally make presentations for schools and other groups. Or these rules may be phrased as encouragements to refrain from even the appearance of wrongdoing. To Gert, there is nothing wrong with professional rules that are not directly related to the universal moral rules as long as obeying these special professional rules does not unjustifiably violate or lead to other unjustifiable violations of universal moral rules.¹²⁴ For example, violating a patient's confidentiality in a particular case in order to improve the medical profession's public image would normally be immoral no matter how it benefits the profession's image. Violating patient confidentiality in this way is not an action that impartial moral agents would publicly allow in that and all similar situations that share the same morally relevant features.

Duty and Professions

According to Gert, all moral agents agree that the rule "Do your duty" is a universal moral rule because all moral agents understand that they stand an increased probability of suffering harm if someone in a position of responsibility fails to discharge their duties. This moral rule covers morally required actions in a society that are not captured by the rule "Obey the law" and the other eight rules. All moral agents know, e.g., that if babysitters, firefighters,

¹²³ The American Psychiatric Association follows the principles of medical ethics established by the American Medical Association. They supplement these principles by discussing applications of these principles to the practice of psychiatry. The issue of improper intimacy with psychiatric patients is discussed as a supplement to Section One of the AMA's principles of medical ethics, that "a physician shall be dedicated to providing competent medical service with compassion and respect for human dignity." See <http://www.psych.org/apa_members/medicaethics2001_42001.cfm>.

¹²⁴ BRF, p 67-68.

lifeguards, and airline pilots did not conscientiously do their duty then much unnecessary harm would be caused that all rational moral agents want to avoid for themselves and those they care about.¹²⁵

For Gert, duties are specific responsibilities people have in virtue of their social roles and relationships. Moral agents may have professional duties, familial duties, social duties, and occupational duties.¹²⁶ These duties evolve and become traditions in a particular culture in response to needs that gradually come to be met in a certain way. Over time, perhaps decades or centuries, moral agents living in a culture form expectations and learn to count on services being provided by a certain group. These expectations become duties for persons working in groups, institutions, guilds, and professions that provide these valuable services.¹²⁷

Gert's moral rule "Do your duty" has interesting implications for interpreting the moral rules in light of the institutions, practices, and purposes of professions. Professionals generally serve in positions of greater responsibility and must routinely make moral decisions where great harms are at stake. As a result, professionals normally have a longer and more specified list of duties to perform. These duties are described in law, policy, codes, oaths, and principles. In professions such as medicine and the military, the level of harmful consequences for moral failure explains why these professions are regulated by so many professional moral rules. According to Gert, this fact explains why ophthalmologists currently have a duty to screen every patient over forty for glaucoma.¹²⁸

¹²⁵ MNJ, p 209.

¹²⁶ MNJ, p 209-210; BRF, p 63. The practice of describing duties in terms of social roles is important for Gert in order to clear up confusions that result when duties are defined more broadly. Defining 'duty' too broadly results in confusing important differences between, e.g., moral rules and moral ideals.

¹²⁷ BRF, p 63.

¹²⁸ This issue was settled in court so it is also a law.

Another interesting feature of professional duties and other role-specific duties is that that many actions are morally required for persons serving in professions and other roles that are morally permitted for ordinary citizens and vice versa.¹²⁹ To Gert, this means that actions that fulfill moral ideals for persons operating outside these roles become moral duties for persons serving within these roles.¹³⁰ The conversion of the morally permissible into the morally required for societal "role players" is poignantly clear in the medical and military professions. Health care providers have a professional duty to *prevent* harms (fulfill moral ideals) associated with maladies and to go out of their way to do so, even at some risks to their personal safety.¹³¹ Military personnel are duty bound to risk their own personal safety to *prevent* harms too, such as protecting their nation from aggression.

However, just because an action is morally required for professional and other "role players" like parents does not necessarily mean that all role-specific duties are morally permissible for persons operating outside those roles. For example, many actions that are duties for medical and military professionals can be morally prohibited for ordinary moral agents, depending on the circumstances of the case.¹³² While a surgeon has duties to operate according to certain standards, under normal conditions ordinary citizens are legally and morally prohibited

¹²⁹ I described this fact earlier by discussing how firefighters have a duty, hence are morally obligated, to rescue a child from a burning building, while for the bystander on the scene the rescue attempt is only morally permitted. In this case the action that fulfills a moral ideal on the part of a bystander would obey a moral rule for the firefighter.

¹³⁰ Bernard Gert, "Morality, Moral Theory, and Applied and Professional Ethics," op. cit., p 20.

¹³¹ This fact explains why, for many moral agents, a physician fleeing the scene of an epidemic is viewed as a transgression of moral duty and not simply as a morally permissible option. Health care providers may also have duties to treat maladies they encounter when "off duty," even though an ordinary citizen in the same situation might not have such a duty. A doctor near a heart attack victim at a sporting event may have a duty to stabilize a victim whereas other fans may not.

¹³² Acts that professionals may do are sometimes illegal for civilians. A civilian cannot just take up arms and go attack the enemy without permission and training from the state. A civilian cannot perform an appendectomy on a patient. Professions are granted monopolies to engage in these activities to ensure standardized practices that minimize harm.

from performing operations in western societies. Military personnel may be morally and legally required to kill enemy soldiers in certain well-defined contexts and perform many other actions that nonmilitary personnel are prohibited from doing. It would take exceptional circumstances, perhaps a highly threatening invasion of national territory before a government might declare it permissible for nonmilitary personnel to kill enemy invaders.

The fact that all universal moral rules have exceptions extends naturally to the professions, whose very reason for existing involves violating moral rules to prevent worse harms (fulfill moral ideals).¹³³ In order to prevent and treat illnesses medical professionals are often morally required or morally permitted to violate moral rules in the performance of professional duties. *Most of these actions cause harm to prevent worse harm.* Surgeons frequently cause pain, loss of freedom, loss of pleasure, even cause disability, yet these actions usually prevent worse harms to the patient or prevent or reduce significant risks of worse harms to the patient. Many of these treatments, e.g., performing an emergency appendectomy, are strongly justifiable since they are actions that all impartial moral agents would publicly accept and want those they care about to accept. It would be irrational to risk fatal peritonitis in order to avoid the discomfort of the appendectomy procedure or to avoid a pronounced fear of, e.g., hospitals or needles; there is no adequate compensating benefit for refusing this surgery. Other treatments are weakly justifiable, such as performing a coronary bypass when there may be other treatment options available, such as changes in medication and diet. In this case, impartial moral agents would probably disagree about what treatment option is best. Still other treatment options are unjustifiable, such as performing a caesarian section on a patient in order to make the obstetrics doctor's busy schedule easier to plan.

For Gert, the moral rules are binding; thus, in professional contexts it is crucial to limit duties to actions that impartial moral agents would publicly accept in all similar situations.

¹³³ BRF, p 61.

Professionals may not use alleged professional duties as an excuse for committing unjustifiable violations of other moral rules. For Gert, this limitation restricts the concept of duty from being propagandized in order to justify many immoral medical practices, such as performing medical experiments on Jews, political prisoners, and the mentally ill without valid consent. Performing medical experiments on moral agents against their will is not behavior that impartial moral agents would publicly allow.¹³⁴

For Gert there is no logical algorithm for deriving one's professional duties; this is especially evident in complex professional cases. In these cases professionals may disagree over the facts, such as what the probability of success is for a proposed medical treatment. If medical professionals agree on the morally relevant facts, they may still disagree about the scope of morality, such as whether fetuses or premature babies should be protected by the moral rules. Or medical professionals can disagree about the ranking of harms and benefits, such as whether preserving patient confidentiality is more important in a particular case than preventing other harms by disclosing confidential information. Or medical professionals may interpret the consequences of a proposed action differently, such as disagreeing about the probability that a treatment option will succeed. These interpretative possibilities mean that some disagreements will be irresolvable; and this, in turn, makes logical entailments in practical issues impossible given the fallibility of all moral agents.¹³⁵ However, for Gert, the fact of disagreement does not collapse morality into total relativism. He believes that it is possible for moral theory to

¹³⁴ MNJ, p 212.

¹³⁵ CM, p ii. Moral agents will always have to make moral judgments. Gert is clear that there is no moral algorithm for making moral decisions correctly in concrete cases. This is impossible given the nature of the subject matter; even if rational moral agents agree on all the facts and on the ranking of harms and benefits, there will always be other considerations like ideology that make for irresolvable disagreements. Human nature is necessarily fallible and epistemically limited. This conclusion does not eliminate the possible for moral progress based on empirical research and other fact-clarifying activities.

successfully account for yet limit disagreement without undermining the view that there are universal moral rules.¹³⁶

Since Gert's universal moral rules only prohibit causing harm or engaging in actions that generally cause harm without an adequate justification, these rules ignore actions that voluntarily prevent harm and promote goods outside of formal social institutions like professional roles. Many people think actions that voluntarily reduce harm and promote goods are the most important part of the common moral system. To Gert, the tendency of some people to think this way is understandable since the general goal of the common moral system is to lessen harms and evils suffered. Gert does not ignore positive actions that reduce harm and promote goods but discusses them at length in his discussion of moral ideals and utilitarian ideals.

Moral Ideals

For Gert, the moral ideals concern actions and initiatives whose goal is to *prevent* the same harms that the moral rules prohibit causing: death, pain, disability, loss of freedom, and loss of pleasure. Each of the moral rules listed in the last section can be restated as moral ideals by replacing the words "Do not" with "Prevent" and by restating the moral rules requiring positive actions as follows: "Prevent the breaking of promises," "Prevent the breaking of the law," and "Prevent the neglect of duty."

Actions can fulfill moral ideals directly or indirectly. Actions fulfill moral ideals directly when specifically targeted at preventing death, pain, disability, loss of freedom, or loss of pleasure. Stopping a mugger or aiding innocent victims of famine or natural disasters are examples of actions that fulfill moral ideals directly. Helping a property owner put out a house

¹³⁶ Gert's defense of universal moral rules and the efficacy of moral theory if correctly articulated goes against what others have said about Gert (Gert thinks mistakenly). For example, Gert refutes Jonsen and Toulmin's criticism of his theory as one of many attempts to deduce correct moral decisions from moral theory. Gert insists that his theory does not deduce obligations. I agree with Gert on this point; he vigorously criticizes the idea of deducing obligations in particular cases. See BRF, p 219 and footnote 2 in same source on p 248.

fire directly helps, e.g., to prevent a loss of freedom and pleasure for that home owner. Actions that fulfill moral ideals indirectly concern practices that generally lessen the amount of harm suffered. A person who works to put effective lighting in public parks indirectly contributes to lessening incidents of mugging. A group that encourages a city council to draft hurricane evacuation procedures for a coastal community is indirectly working to prevent harms associated with these terrible storms.¹³⁷

Fulfilling moral ideals is normally only morally permitted. Gert provides three core reasons for this view. First, fulfilling moral ideals are actions that prevent harm, and these actions are impossible to perform with moral impartiality, i.e., with respect to all members of the group protected by the moral rules. Fulfilling moral ideals always involves actions directed towards specific individuals or groups that are part of the larger group protected by the moral rules. If I give money to a charity I necessarily discriminate towards that charity. I could just as easily have given the money to a different charity. Choosing to fulfill moral ideals or choosing which moral ideals to fulfill are rational options. Second, moral ideals are impossible to fulfill all the time. While people normally obey the moral rules all the time passively, no one can actively prevent harm every minute of the day. Making the moral ideals into moral as moral requirements would make people morally guilty during most of their lives. Walking one's dog or reading a novel would be immoral. Results like these are counterintuitive. Even if fulfilling moral ideals were only morally required for those people that one came in contact with, the burden would be unrealistic and the results counterintuitive. It is untenable to hold, e.g., that people are morally required to give money to every beggar they come in contact with.¹³⁸ Third, nearly all moral agents employing the common moral system do not normally favor punishing moral agents who

¹³⁷ MNJ, p 249-250.

¹³⁸ MNJ, p 248, 254-255.

fail to fulfill moral ideals.¹³⁹ Requiring people to follow the moral ideals is too idealistic. Gert states,

To hold that morality requires everyone to follow moral ideals is a misguided attempt to encourage such action. It is more likely to provide an excuse for those who wish to dismiss morality as impractical or too difficult for ordinary human beings.¹⁴⁰

Since all moral agents want to avoid unjustifiable harm, and since fulfilling moral ideals prevents these harms, people want other moral agents to fulfill the moral ideals regularly. As a result, moral agents generally think the moral ideals should be encouraged instead of enforced. This encouragement can take many forms, from the education and training of children and employees to public service announcements and social and institutional rewards. However, a community where people follow moral ideals regularly is a community where informed moral agents want to live since such communities are places where less harms occur. Gert states, "For a human society to flourish, a significant number of people must follow them [the moral ideals] from time to time."¹⁴¹ By discussing the moral ideals explicitly in terms of the moral rules and encouraging people to follow them, Gert's theory provides a realistic guide for those who want to do more than is morally required.¹⁴²

Since moral ideals are only morally permitted, people who do more than is morally required to prevent harm often deserve thanks or praise.¹⁴³ If a person is rescued from being mugged by an individual who intervenes, that person will probably express gratitude for the help.

¹³⁹ An exception not favoring punishment would be favoring punishment for someone who failed to prevent a grave and imminent harm when the cost to the agent was trivial.

¹⁴⁰ MNJ, p 265.

¹⁴¹ MNJ, p 247.

¹⁴² MNJ, p 265-266.

¹⁴³ People actually do praise and thank people who regularly fulfill the moral ideals. Ordinary persons employing the common moral system recognize the difference between moral rules and moral ideals, and their actions reflect an understanding of the difference.

People who consistently work to prevent harm are recognized as good people and this recognition encourages people to follow moral ideals. In contrast, people who consistently obey the moral rules do not deserve thanks or praise and these people are not recognized as good people. No one deserves praise or thanks for obeying all the moral rules last night while they slept. People who only obey the moral rules are sometimes rightly judged using negative adjectives such as selfish, indifferent, or lazy.

It is easy to give a practical example to illustrate why following moral ideals often deserves praise but obeying the moral rules does not. Suppose a plumber agrees to come out to your house to fix your leaky sink. The plumber is morally required to keep his promise and fix it. He is not doing you a favor and you do not owe him praise or any special honor. However, if he failed to fix it, he violates moral rules unless he had an adequate justification for his failure. If he ignores appointments, his punishment will be a loss of business.¹⁴⁴ Now suppose the same plumber works several hours a week to do plumbing work *pro bono* for the poor in his community. In this case the plumber fulfills moral ideals. He is not obligated to help, yet he prevents possible harms associated with degraded living conditions for the poor. The plumber demonstrates compassion and generosity, but he does not have to do this service simply because he can do it. In this case the plumber merits praise or perhaps special recognition. He may be a good plumber; in this case he shows himself to be a good person with respect to his *pro bono* work.

To Gert, moral ideals are distinguishable from other ideals such as religious ideals, personal ideals, and national ideals. These nonmoral ideals are not part of a system that applies to

¹⁴⁴ When and how to punish are judgments that are tricky and subject to much moral disagreement. What seems clear is that punishment should only be administered by appropriate authorities. Vigilantism is consistently frowned upon, as is punishing children unless a parent or other accepted authority such as a school principal. Administering punishment violates moral rules and must be adequately justified. I would not expect the police to punish the plumber for breaking his promise to fix my sink. I simply would not recommend his services to others.

all moral agents and that all moral agents are responsible for knowing, understanding, and would publicly allow as a guide for behavior. While moral ideals are necessarily related to harms all moral agents want to avoid, nonmoral ideals are not. Whenever a religious ideal is based on revelation or scripture, that ideal is not something that all impartial moral agents would publicly accept. Additionally, religious ideals are frequently explained as moral requirements rather than moral permissions. These obligations are not acceptable to all impartial moral agents using only rationally required beliefs. Personal ideals vary greatly and concern the life plans of individuals. Some people value personal ideals such as wealth or prestige while others seek to be maximally philanthropic or emulate someone they respect. No one's life plans are plans that all impartial moral agents would accept as ideals that apply to all moral agents. National ideals are based on constitutions or the decrees of those in power. For example, socialistic, democratic, and communist ideals are not ideals that all impartial moral agents know and understand, nor would all moral agents accept them as part of the common moral system if they were fully informed.¹⁴⁵ Additionally, religions, persons, and nations normally do not distinguish the moral ideals they espouse from other ideals they espouse. This mixing of ideals is confusing.

To Gert, sometimes fulfilling moral ideals provides an adequate justification for violating moral rules, whereas fulfilling religious, personal, or national ideals *qua* religious, personal or national ideals, never provides an adequate justification for violating universal moral rules.¹⁴⁶ Every action that follows a moral ideal but violates a moral rule must be adequately justified. People who become temporarily hysterical may be forcibly restrained if necessary to prevent them from harming themselves or others. At other times people may need to be quarantined to prevent a deadly disease from spreading. Parents cause harms to their children by forcing them to receive inoculations against childhood diseases. These examples are all justifiable. In contrast, it

¹⁴⁵ MNJ, p 257-258.

¹⁴⁶ MNJ, p 248. I use '*qua*' here to indicate that, e.g., a religious ideal could also be a moral ideal.

is never justifiable to force a religious conversion, an oath of political allegiance, or the adoption of a specific plan of life. It is rarely justifiable to blackmail a person with special skills to employ those skills to assist a political coup.

In many cases it is a complex matter to assess the justifiability of violating a moral rule to fulfill a moral ideal. For Gert, each proposed violation of moral rules has to be evaluated on a case-by-case basis since morally relevant facts differ from case to case. Breaking a relatively trivial promise to save a life in imminent peril is obviously justifiable. However, it is not clear whether Robin Hood was adequately justified in robbing from the rich to give to the poor. It is not clear whether it is justifiable to torture a terrorist in order to increase the likelihood of preventing a radiological device from killing and injuring many innocent people. It is not clear whether vaccinations against smallpox should be made mandatory, considering the fact of herd immunity and that fact that the vaccine will kill a very small percentage of inoculates. The circumstances of each case would have to be cashed out carefully to make informed moral judgments.

Gert acknowledges also that many violations of moral rules to fulfill moral ideals are clearly unjustifiable. It is normally immoral to cause harm to someone you do not care about only because it prevents harm for someone you do care about. It is immoral for parents to kidnap a stranger to harvest organs for a loved one who needs a transplant.

Gert admits that his distinction between moral rules and moral ideals is not new. Mill acknowledged this distinction.

The moral rules which forbid mankind to hurt one another (in which we must never forget to include a wrongful interference with each other's freedom) are more vital to human well-being than any maxims, however important, which only point out the best mode of managing some department of human affairs.... It is their observance which alone preserves peace among human beings; if obedience to them were not the general rule, and disobedience the exception, everyone would see in everyone else an enemy against whom he must be perpetually guarding himself.... A person may possibly not need the benefits of others, but he always needs that they not do him hurt.¹⁴⁷

¹⁴⁷ See John Stuart Mill, *Utilitarianism*, op. cit., chapter 5, paragraph 3.

For Gert, the relationship between universal and particular moral ideals is analogous to the relationship between universal and particular moral rules. If moral agents conscientiously strive to prevent themselves from offending other moral agents in situations where their offenses are publicly allowed, then those moral agents fulfill moral ideals. These moral agents are fulfilling the universal moral ideal "Prevent pain" in a cultural context by striving to prevent offending people they come in contact with. Thus, if a man living in Texas chooses not to wear earrings because he does not want to cause even morally permissible yet culturally tolerable offenses, then that man is fulfilling moral ideals.¹⁴⁸ Thoughtful parents teach their children that avoiding even morally permissible yet culturally tolerable offenses demonstrates common courtesy.

Particular moral ideals are also subject to interpretation depending on contextual factors more fine grained than culture. For example, demonstrating concern to prevent unnecessary pain may lead a moral agent to offer advice about a particular moral decision, such as where to invest one's retirement savings or what car to buy. However, if the advice is not sought the advisor runs the risk of being viewed as meddlesome. The personality of the agent, the magnitude of pain the advisor is trying to prevent, the duration and intensity of that possible pain, and the probability of the pain occurring are all be relevant to whether the advisor should or should not voluntarily voice his concern.

Utilitarian Ideals

Moral rules and moral ideals can also be distinguished from utilitarian ideals. Utilitarian ideals are unique in that they very rarely provide an adequate justification for violating moral rules. However, since fulfilling utilitarian ideals occasionally justifies violating moral rules, Gert discusses utilitarian ideals in more detail than religious, personal and national ideals. Utilitarian

¹⁴⁸ BRF, p 57.

ideals concern actions that promote benefits or goods.¹⁴⁹ According to Gert, the benefits or goods that the utilitarian ideals promote are increased abilities, increased knowledge, or increased pleasure.

A good way to clarify Gert's account of utilitarian ideals is to contrast them with moral ideals. This distinction is important since following moral ideals often justifies violating moral rules, whereas following utilitarian ideals rarely justifies violating moral rules. Moral agents employing the common moral system naturally care more about actions that prevent harm than actions that promote goods.

To Gert, the distinction between utilitarian and moral ideals can seem more vague than it really is. Many people interpret these ideals incorrectly. It is possible to interpret actions that prevent death, pain, and disability as actions that promote life, pleasure, and wholeness. For example, people often talk as if activities such as volunteering to work in a health clinic promote goods. Saying that volunteering in a health clinic "promotes health" obfuscates the distinction. To Gert, working in a health clinic prevents death, pain, and disability instead of increasing abilities, knowledge, or pleasure.

To clarify the difference between moral and utilitarian ideals, consider the following contrasted examples. If a missionary volunteers to administer antibiotics to people in a foreign country threatened with a deadly disease, she prevents death, pain, and disability, and thus fulfills a moral ideal. However, if this missionary went instead into a reasonably healthy community to distribute vitamins, give coloring books to children, or teach the locals about Plato, she would be promoting goods. Donating one's money to Oxfam fulfills a moral ideal by preventing starvation. Donating your money to build a bigger swimming pool for the community fulfills a utilitarian ideal by promoting pleasure or increased ability.

¹⁴⁹ MNJ, p 126, 253.

The conceptual distinction between moral and utilitarian ideals is most blurry with respect to the moral rules that prohibit causing a loss of freedom and a loss of pleasure. For Gert, actions that prevent a loss of freedom or pleasure and actions that promote increases of freedom or pleasure are distinguished by whether or not the actions are directed towards "deprived persons." Actions that help deprived persons fulfill moral ideals. Actions directed at people who are not deprived promote goods.

For Gert, what makes a person deprived is culturally relative. People in primitive agrarian societies are not deprived if they do not have running water in their homes. People in the United States who live without running water are presently considered deprived. Thus, providing running water to persons living in the United States prevents harm; providing running water to persons living in primitive agrarian societies promotes goods.¹⁵⁰ People living in primitive agrarian societies would not reasonably expect their homes to have running water. Giving these primitive farmers running water increases their pleasure and abilities and does not prevent harm.

Gert argues that the distinction between moral and utilitarian ideals is made clearer by presupposing a status quo.¹⁵¹ Violating the moral rules without adequate justification worsens the status quo by causing harm. Fulfilling moral ideals preserves the status quo by preventing harms. Promoting goods improves the status quo by increasing goods and benefits. Obviously the status quo changes from time to time within a culture and differs between cultures. The status quo is improved when governments, individuals, and other groups are proactive in following the utilitarian ideals. Over time new living conditions can create new reasonable expectations. What counts as deprived naturally changes to accommodate these new expectations.

¹⁵⁰ MNJ, p 364-365.

¹⁵¹ Gert explicitly states in MNJ, p 253, "Morality starts with the status quo."

Consider actions that promote the arts. Raising money to fund a new art museum does not prevent harm but promotes a good; it improves the status quo.¹⁵² Raising money to keep a presently existing art museum open, one that many people gain knowledge and pleasure from visiting, seems to prevent harm and thus maintains the status quo. In spite of this distinction, it is rarely justifiable to violate moral rules without consent to maintain or promote the arts or build a public park.¹⁵³ Unless very unusual facts suggested otherwise, a person who embezzled money from a business to maintain an existing library or fund a new branch of that library would never be adequately justified. However, if the same person lobbied that business to voluntarily contribute money to maintain an existing library or fund a new branch of that library, his action would clearly be justifiable.

To Gert, actions that violate moral rules to follow utilitarian ideals (promote goods) without consent are almost never justifiable, unless the groups performing these actions have special responsibilities such as parents, teachers, and governments.¹⁵⁴ These groups actually have a duty, within limits, to violate moral rules to promote goods.¹⁵⁵ For example, a government that did not take away marginal amounts of freedom and pleasure through taxation to build and maintain needed roads or schools would be neglecting its duties. If governments did not have these duties, then they would be acting immorally when they taxed citizens without consent to provide adequate roads and schools.

¹⁵² MNJ, p 367.

¹⁵³ MNJ, p 367.

¹⁵⁴ There are rare exceptions to this restriction that are socially acceptable, such as deceiving one's spouse about an upcoming birthday party in her honor.

¹⁵⁵ MNJ, p 125, 367, 370. Gert claims Bentham and Mill defended promoting goods as the point of morality because they were most concerned with political philosophy. Gert's moral theory is chiefly about the actions of individual moral agents. Discussing utilitarian ideals brings political philosophy into the debate since governments are the primary entity that is justified in violating moral rules to fulfill utilitarian ideals. Gert admittedly does not delve at length into political philosophy, though he also admits wanting to some day.

Governments usually are only morally permitted to violate the moral rules against depriving of freedom and pleasure to fulfill utilitarian ideals. When governments tax citizens to fund parks, roads, the arts, and education, they take away some freedom and pleasure of its citizens without consent. To Gert, most impartial moral agents think these taxes are justifiable, but only within reasonable limits. Gert's distinction between moral and utilitarian ideals explains why no fully informed impartial moral agents would publicly allow a 60% tax on incomes to promote goods like schools, parks, and museums, particularly when the government has more important duties that involve preventing harm.¹⁵⁶

It is crucial to Gert that governments are adequately justified taxing citizens *without consent* to promote goods. The reasons for not needing consent are practical. Moral agents disagree as to how many tax dollars they would publicly allow to be used to promote utilitarian ideals. People also disagree about what type of arts, museums, parks, and schools they would prefer to be funded and they disagree about how best to distribute these dollars among various projects. Young parents generally want better schools more than senior citizens do, while senior citizens may prefer that more tax dollars be channeled into providing a local chamber orchestra. If governments required consent to promote goods, gridlock would result. It would also put governments in the absurd position of being morally culpable when they used tax revenues to promote goods that all impartial moral agents would not publicly allow. However, moral agents agree that maintaining police, hospitals, militaries, and fire departments is more important than

¹⁵⁶ This language is vague because these decisions require moral judgments that consider circumstantial facts. I can only offer more examples. Municipalities sometimes temporarily increase sales taxes a fraction of a percent to fund projects such as a new sports stadium. Many citizens accept these taxes because they cost little personally yet are believed to promote a community good. However, if a government imposed a ten percent income tax for one year to fund arts and parks, then no moral agent would favor it. In contrast, if the community was suffering an epidemic and the government imposed a temporary ten percent income tax to fund research to find a cure quickly, then most moral agents would accept these significantly higher taxes. Preventing evil is more important to people employing the common moral system than promoting good.

improving the arts, schools, and parks, so a larger relative percentage of tax revenues will generally go toward these harm-preventing activities than towards good-promoting activities.¹⁵⁷

There are limits to behaviors the government can force its citizens to do in order to promote goods.¹⁵⁸ No impartial moral agent thinks governments should be permitted to cause pain, death, or disability, such as using torture, to follow utilitarian ideals. Also, no informed moral agents would consent to allowing governments to cheat, deceive, break the law, shirk duties, or break promises to promote goods like public parks, schools, and the arts. If governments were justified in violating these moral rules to promote goods, then Gert argues that the harm from mistrust and disorder would outweigh the benefits gained.¹⁵⁹

Moral Virtues

An explicit description of the common moral system that ordinary people employ like the grammatical system would be incomplete without an account of the role moral virtues play in making moral decisions and judgments.¹⁶⁰ For this reason, Gert discusses the role of moral virtues at length; his account describes how the moral virtues influence ordinary people to obey moral rules and fulfill moral and utilitarian ideals regularly. Gert explains the priority moral virtues have with respect to the moral rules, moral ideals, and utilitarian ideals.

¹⁵⁸ In also mentioned parents and teachers as people who can violate moral rules. Parents violate moral rules to promote goods when requiring their children to practice the piano. Learning music does not prevent harm, yet most moral agents defend a parent's right to take away children's freedom and pleasure to promote their future good. The case of teachers is obvious. Additionally, most professions impose auxiliary duties to promote goods in addition to primary professional responsibilities. For example, the U.S. military profession expects officer to perform what are called "additional duties." Officers are expected to join the officers' club and pay dues even if the privileges are never used. Officers are also expected to occasionally perform services that foster good military/community relations. It is customary for organizations such as the VFW and the Rotary Clubs located near military bases to invite active duty officers to serve as guest speakers for holiday functions such as Independence Day and Veterans Day celebrations. Public affairs offices at U.S. military bases have speakers' bureaus to schedule speakers. Another example would be sending officers out to a local high school as a recruiting and public relations tool.

¹⁵⁹ MNJ, p 369.

¹⁶⁰ MNJ, p 277.

For Gert, moral virtues are dispositions to obey moral rules and fulfill moral and utilitarian ideals. Morally virtuous people obey these rules and ideals regularly, habitually, and enjoy doing so. All impartial moral agents want others that they come in contact with to have the moral virtues; no impartial moral agents want others they come in contact with to be morally vicious.¹⁶¹ To Gert, moral virtues and vices have a direct conceptual relationship to moral rules and moral ideals. Gert states, "The moral virtues involve free, intentional, voluntary actions related to the moral rules and ideals."¹⁶² For Gert, if moral agents did not universally want to avoid harms and to live in communities where people were encouraged to prevent harm, the moral virtues would lose their significance.¹⁶³ Morally virtuous people are less likely to cause harms that all moral agents want to avoid without adequate justification. Morally virtuous people are more likely to consistently work to prevent harm and promote goods.

No moral virtues correspond to the first five moral rules. People who do not cause death, pain, disability, loss of freedom, and loss of pleasure do not demonstrate praiseworthy character traits by not causing these harms.¹⁶⁴ However, people who commit unjustifiable violations of the

¹⁶¹ MNJ, p 284-285, 291. Gert explicitly states, "A moral virtue is any trait of character that all impartial rational persons favor all persons possessing." He also states, "Any account of the virtues or of rationality that makes it impossible for all impartial rational persons to want everyone, including themselves, to have all of the virtues is inadequate." These statements make strong claims that seem problematic. For Gert, the moral virtue associated with the moral rule "Do not deceive" is "honesty." However, it is not difficult to articulate counterexamples to Gert's statements. A soldier fighting an enemy would, I think, want enemy soldiers to lack honesty in certain situations if it would inhibit the enemy's ability to effectively fight against him. In other situations the same soldier would clearly want enemy soldiers to be honest with him, such as would be the case if he were captured and were promised medical care for his injuries. To be charitable, I think the aforementioned quotes may have been hastily written. Since for Gert the moral virtues are associated with moral rules, then, since moral rules have justifiable exceptions, Gert would need to tell a story as to why moral virtues have justifiable exceptions too. Another way to be charitable to Gert would be to say that, while Gert says that moral virtues are traits of character moral agents want all people to possess, it is not the case that moral agents always want all people to exemplify that virtue in every situation.

¹⁶² MNJ, p 283.

¹⁶³ MNJ, p 303.

¹⁶⁴ CM, p 115.

first five moral rules are vicious and generally considered cruel.¹⁶⁵ People who do not prevent violations of the first five rules when most moral agents could reasonably expect it are callous.¹⁶⁶

Moral virtues and the corresponding vices apply to the second five rules. This correspondence is both conceptual and colloquial. People who do not deceive others are honest; people who deceive are not. People who keep their promises are trustworthy; people who break promises are not; people who shirk their duties are not dependable; people who do their duty are dependable.¹⁶⁷

A person who has a moral virtue occasionally ought to violate a moral rule. People with the moral virtue of truthfulness may commit justifiable lies. Telling the truth every time demonstrates a lack of tact. A truthful person may work in a profession like undercover police work where some lies are not only justifiable but also required by one's professional duty. These lies do not count against the person having the moral virtue of truthfulness or honesty. Clearly some lies are not indicative of vice, but a sign of virtue. No algorithm exists for attributing the moral virtues and vices to people.¹⁶⁸

People who obey moral rules, fulfill moral ideals, and promote goods are people who have been trained and educated to do so. This process begins early in life with children.¹⁶⁹ Without proper training, children will not mature into moral agents who habitually obey moral rules, fulfill moral ideals, promote goods, and enjoy doing so. Although inculcating moral virtues

¹⁶⁵ CM, p 115. Some violations of moral rules are unjustifiable but are performed, e.g., by accident. These people are not necessarily cruel. Cruel people are either indifferent to or actually enjoy the suffering of others.

¹⁶⁶ CM, p 115.

¹⁶⁷ CM, p 116; MNJ, p 283-284.

¹⁶⁸ MNJ, p 283-284.

¹⁶⁹ CM, p 115; MNJ, p 280. Gert says that questions as to how best to develop virtuous character is an empirical issue and not resolvable by philosophical analysis.

begins with parents and other guardians, schools, churches, coaches, mentors, supervisors, and others in authority are also responsible for reinforcing them.

This responsibility does not entail that any action that trains educates, and reinforces the moral virtues is morally permitted. If a parent can teach virtues just as effectively by encouragement rather than punishment, then they can be taught without violating moral rules. All impartial moral agents agree that punishment is normally unjustifiable method in those cases. It is better if people behave morally because they want to not only because they fear punishment; these people are more likely to behave morally when no one is looking. For Gert, morally virtuous people understand that living virtuously is rationally preferable to living viciously; morally virtuous people generally suffer less harm than vicious people. For this reason, Gert argues, morally virtuous people are usually happier.¹⁷⁰

For Gert, moral rules and moral ideals are normatively primitive to moral virtues. Unlike the moral rules and moral ideals, moral virtues may serve bad ends. The cliché "honor among thieves" is accurate. The moral virtues may be used to cause great harm unless moral agents understand the actions that morality requires, prohibits, encourages, and permits. A group of thieves that consistently succeeds robbing banks has members that are probably trustworthy, fair, dependable, and not deceitful with each other. A group of thieves whose members lacked these character traits would fail and be quickly apprehended by police.

To Gert, it is a travesty when moral virtues support evil ends by making in possible for people to more efficiently commit unjustifiable violations of moral rules. History is replete with examples of individuals, groups, and nations for whom moral virtues served evil ends, causing

¹⁷⁰ MNJ, p 340. The American military profession exemplifies a community whose members want each other to have certain character traits such as truthfulness. The American military profession can take a rebellious, virile, headstrong individualist and through intense training, usually inculcate truthfulness in a few short weeks, making that person a productive public servant who can be trusted. All American military professionals want their colleagues to be truthful. In the complex, foggy, and lethal circumstances of military missions, a lack of truthfulness in communicating information up the chain of command leads to decisions that cause much unnecessary harm to friendly soldiers, even death.

great harm. The moral virtues are crucial but are instrumental to the moral rules, moral ideals, and utilitarian ideals in the common moral system. However, the moral rules, ideals, and utilitarian ideals are impotent unless people are disposed to follow them and take responsibility for transmitting and reinforcing them in the people they have authority over.¹⁷¹

Another reason the moral rules, moral ideals, and utilitarian ideals are normatively primitive to moral virtues is that moral virtues provide an ambiguous standard. For Gert, it is impossible to describe in every case what it means to model moral virtues at the right time, in what context, in what way, and in what amount. Since human nature is fallible and vulnerable, no perfect moral exemplars exist to emulate. A trustworthy person may also commit unjustifiable breaches of the law. In contrast to the moral virtues, the moral rules and associated ideals are clear and easy to describe in a way that is known, understood, and acceptable to all moral agents using only rationally required beliefs. These moral rules and ideals therefore provide a more useful guide for making moral decisions and judgments. The moral rules and ideals are clear. Ambiguities in the common moral system do not concern these rules and ideals, but rather, in making moral decisions in complex and chaotic situations where it is necessary to assess proposed violations of moral rules that involve obeying another moral rule, or fulfilling a moral or utilitarian ideal.

To Gert, the moral rules and ideals also provide a clearer standard for judging the moral virtue of other moral agents. People who chronically violate moral rules without adequate justification are morally vicious. Vicious people consistently cheat, deceive, shirk duties, disobey the law, kill, disable, cause pain, rob of freedom, and rob of pleasure more than ordinary people do in their occasional moments of weakness. Using the language of virtue ethics, morally vicious

¹⁷¹ MNJ, p 344-345. Common morality provides the reason for wanting others to be virtuous. Not being virtuous will increase the probability of causing harm. This is what Gert calls the "moral answer". A group of thieves wants members of their group to demonstrate certain moral virtues, even though their actions commit unjustified violations of moral rules. No impartial moral agent would publicly allow bank robbing.

people are exceptionally deceitful, dishonest, unfair, undependable, neglectful, and mean.¹⁷² In contrast, morally virtuous people are exceptionally dependable, scrupulous, honorable, trustworthy, honest, fair, courageous, and compassionate.¹⁷³

To Gert, people who merely obey the moral rules are not morally virtuous. Morally virtuous people fulfill the moral ideals and utilitarian ideals more often than most people do. Obeying moral rules is expected; morally virtuous people deserve praise and emulation. Obeying moral rules it is a sign of a lack of moral vice, not a sign of moral virtue. Morally virtuous people fulfill the moral ideals and the utilitarian ideals frequently using good judgment, and they enjoy doing so.¹⁷⁴

The moral virtues are just as important in the professions as in ordinary life. Every profession needs its members to conscientiously abide by that profession's code of ethics, to practice the moral virtues conscientiously and with pleasure, to follow the profession's policies and procedures, and to set a positive example for other members and the community at large. The privileged status of professions is not a right; this status can be taken away if the society the profession serves thinks a profession is failing to regulate itself and perform its duties competently. Professionals must be trained and educated to perform their duties from a commitment to the ideals of the profession and not just for the privileges it provides. Professionals with this level of dedication are morally virtuous; they are more disposed to do even more than duty requires and to enjoy doing so. Many professionals have great

¹⁷² A whole series of adjectives could be created to describe morally vicious people, i.e., people who commit unjustifiable violations of moral rules with impunity.

¹⁷³ This list is meant to illustrate the connection between the moral rules and the moral virtues and is not exhaustive. All rational people want people they come in contact with to be virtuous and not vicious, because being around virtuous people makes one less likely to suffer unnecessary harm. In some contexts, impartial rational people might want soldiers or covert operatives to be, e.g., ruthless. However, exceptions like these are nearly always limited by professional rules that restrict the time, place, and extent of the behavior.

¹⁷⁴ MNJ, p 277-290.

responsibilities; no one wants professionals to be vicious since great harm would be caused. No one wants professionals merely to robotically obey professional rules either.

Gert also makes a crucial distinction between moral virtues and personal virtues. This distinction concerns how the virtues in these two categories relate to the moral rules. The moral virtues are virtues that all moral agents want others to have. Morally virtuous people are more likely to consistently obey the second five moral rules and fulfill the moral ideals regularly. Therefore, since all people want to avoid harm, all people naturally want themselves and those they care about to be around morally virtuous people.

The personal virtues are different from moral virtues because they are not virtues that all impartial moral agents would want all other moral agents to have, but they are virtues that everyone wishes they themselves had. Thus, the personal virtues are not necessarily related to morality. Examples of personal virtues are courage, temperance, patience, fortitude, determination, and prudence.¹⁷⁵ Examples illustrate this distinction. Personal virtues play an important role in the professions. Soldiers engaging in a battle do not want the enemy to be courageous and determined, but cowardly and unfocused. Soldiers want troops they are fighting *with* to have these qualities. A person seeking a job wants competitors to lack personal virtues important to the potential employer. It is possible to have personal virtues and lack moral virtues.

It is also possible to have personal virtues and have many moral vices; personal virtues can make an immoral person even more pernicious. However, if moral agents have the moral virtues, they will necessarily have personal virtues too.¹⁷⁶

Justifying Violations of Moral Rules

To Gert, moral rules have exceptions and moral agents know this fact. However, all exceptions to moral rules must be justifiable. While many violations of moral rules are clearly

¹⁷⁵ MNJ, p 292-294; CM, p 116.

¹⁷⁶ CM, p 116.

justifiable or clearly unjustifiable, many proposed violations of moral rules are neither clearly justifiable nor clearly unjustifiable. As a result, some moral decisions and judgments can be difficult to make. This fact is also obvious to moral agents. Sometimes moral agents disagree about what counts as adequate justifiability. Gert discusses the issue of justifiability at length. An explicit description of the common moral system that does not discuss how to assess proposed violations of moral rules is an incomplete description and is not useful to moral practitioners as a behavioral guide.

For Gert, justifying violations of moral rules is similar to justifying the moral rules themselves. Both are justifiable by considering whether they are rules and violations that impartial moral agents would publicly accept using only rationally required beliefs.¹⁷⁷ The moral rules Gert lists are universal since all impartial moral agents would publicly accept them if moral agents use only rationally required beliefs. Justifying violations of moral rules is more complex since the strength of justifiability varies greatly from case to case. However, the important concepts of rationality, impartiality, and publicity apply in the same ways. Gert puts it this way.

I do not claim that we all agree on which violations [of the ten moral rules] satisfy these three conditions [impartiality, rationality, publicity], but I think that we all agree that no violation is justified unless it satisfies all three of these conditions.¹⁷⁸

The concepts that I have already discussed, namely, moral impartiality, publicity, and rationality, are necessary conditions to an adequate justification for violating a moral rule. A justifiable violation of a moral rule is such that, if the violation is justified in one case, the violation is justified in all other cases that share the same morally relevant features. A violation that meets this condition satisfies moral impartiality, since the requirement includes everyone

¹⁷⁷ Moral rules and justifiable violations presuppose agreement on what rule is being violated and on who is in the group protected by the moral rules. In each case however, all moral agents will not necessarily agree on these two issues.

¹⁷⁸ CM, p 16; "Morality, Moral Theory, and Applied and Professional Ethics," op. cit., p 16.

who is protected by the moral rules.¹⁷⁹ Suppose a desperately poor person steals food to feed his family. If in one particular case this theft were justifiable, then similar theft is always justifiable in relevantly similar situations. Otherwise the theft is not an action that impartial moral agents could publicly accept. The fact, e.g., that the thief in one case and the thief in another case are of different races would not matter.

For Gert, publicity is also a necessary condition for any justifiable violation of a moral rule. Violations must be publicly acceptable by impartial moral agents.¹⁸⁰ Otherwise they are unjustifiable. If a violation is justifiable, it is a violation that at least some moral agents would accept as a public practice that all moral agents know and understand justifies violating the same moral rules in relevantly similar situations.

For Gert, rationality is also a necessary condition to adequately justify violating a moral rule. Justifiable violations of moral rules are justifiable, in part, because they are supported with reasons that can make what is an otherwise irrational action into one that is either rationally required or rationally allowed. Allowing a doctor to remove a leg is a disabling action that is justifiable by reason of the aggressive cancer growing in the femur. Without the cancer present or some other condition warranting the disabling action, that action would be immoral. Wanting that action done to oneself or a loved one would always be irrational, absent some adequate compensating benefit for suffering the harm.

Corporately these three features are sufficient to violate a moral rule. This is verified by considering what generally happens when people commit unjustifiable violations of moral rules.

¹⁷⁹ Employing the *ceteris paribus* clause also captures this idea of relevant similarity. If case A is similar to case B, then, *ceteris paribus*, if a violation is justified in case A, the same violation is also justified in case B. Gert criticizes this approach as vague. In MNJ, page 226, Gert says that the *ceteris paribus* clause is vague yet is employed by some moral philosophers to do most of the work of assessing relevant similarity between cases. Gert argues that what is needed is a precise account of morally relevant features that are general enough for all rational people to understand. This preserves morality as an informal public system.

¹⁸⁰ The question of the strength of a justification for violating moral rules in a particular situation is something I will discuss later in this chapter and in subsequent chapters.

In every case these violators of moral rules are acting partially (usually towards themselves), secretly, or irrationally. The prevalence of hypocrisy is evidence that some moral agents understand what morality requires but either lack the will to do it or simply want to do the wrong thing for other reasons.

For Gert, violations of moral rules are strongly justifiable, unjustifiable, and weakly justifiable. If all impartial moral agents would publicly allow the violation of a moral rule in a particular case and similar cases that share the same morally relevant features, the violation is strongly justifiable. Breaking a trivial promise to save a life is strongly justifiable, as is inoculating a child against tetanus.¹⁸¹ If no impartial moral agents would publicly allow the violation of a moral rule in a particular case and similar cases that share the same morally relevant features, the violation is unjustifiable. Torturing someone only because it gives you pleasure is unjustifiable, as is poisoning your grandparents simply to inherit their estate. If there is disagreement about whether impartial moral agents would publicly allow the violation in a particular case and all relevantly similar cases, even if they use only rationally required beliefs, the violation is weakly justifiable.¹⁸² Continuing a painful medical treatment that offers only a small chance of healing one's body of a terminal disease is also weakly justifiable. While disagreement on these sorts of issues is prevalent, to Gert many disagreements are irresolvable and therefore must be accepted as a fact of life.

Moral rules can be justifiably violated to obey other moral rules, such as when a lawyer causes psychological pain to do his duty by performing a thorough cross-examination. Moral rules can be violated to fulfill moral ideals, such as when someone breaks traffic laws to get a heart attack victim to the hospital. And moral rules can be violated to fulfill utilitarian ideals,

¹⁸¹ I say "Almost" in this sentence because there are some moral absolutists. I hesitate to call them 'irrational' for holding that view. I just disagree pending additional evidence.

¹⁸² CM, p 48; MNJ, p 222-223.

such as when the government taxes citizens to build a theater. The strength of the justifiability of a proposed violation of moral rules always depends on the circumstances of *that* particular case. For Gert, what counts as a strongly justifiable, weakly justifiable, or unjustifiable violation is determined by whether all, some, or no impartial moral agents would publicly allow the violation and all other violations like it, using only rationally required beliefs as a basis point.

Since all universal moral rules have exceptions, these rules are not absolute. For Gert, there are no absolute moral rules, and moral agents who use only rationally required beliefs implicitly know this fact. This important distinction between universal and absolute moral rules is not unique to Gert. Wakin shares Gert's position as is indicated in the following passage.

Clearly, those moral obligations dealing with human act-types...are not absolute obligations. Does that mean that they are relative obligations to be observed only when we find it expedient to do so? Certainly not. Rather it is the case that we could best refer to these types of moral obligations by use of another term;...let us call them "universal" obligations....Ought they always to be observed? No. Then they cannot be absolutes. Can they conflict? Yes. Then they cannot be absolutes. Are they sufficiently arbitrary to be ignored whenever one is in a different society or whenever it is convenient or expedient to do so? No. Then they cannot be relative principles in either the cultural or most subjective sense. Universal obligations of this sort hold for all human beings (they are not subjectively or culturally relative) but not in all possible circumstances (they are not absolute). They hold in analogous sets of circumstances and they may conflict with each other¹⁸³

Justifying violations of moral rules is accomplished both subconsciously and consciously. In many situations, moral decisions are simple; moral agents rarely give more thought to these moral decisions than they give to the decision to brush their teeth. Cleansing a child's minor wound is a moral decision that is made automatically; it is a moral decision if the cleansing process is painful. If pressed to justify this action, practically every informed rational parent would give similar answers involving killing germs or preventing infection. In the professions, these automatic decisions follow established rules and procedures that are widely accepted and uncontroversial; they are usually a matter of routine, reinforced by training and education.

¹⁸³ Malham M. Wakin, "The Ethics of Leadership I," in *War Morality and the Military Profession*, 2nd Ed, edited by Malham M. Wakin, Boulder: Westview Press, 1986, p 195.

In other more complex and emotionally involved situations, people consciously deliberate about moral decisions when the issue involves more than one weakly justifiable option. Conscientious people deciding whether to place an aging parent in a nursing home will normally give the issue much conscious deliberation. They will consider morally relevant features like the desires of the parent, the funds available, their motives, the reputations of the nursing homes considered, the programs each home offers, and what costs the parent's health insurance will cover.

In cases where strategic planning is needed, conscious deliberation is often possible, though factors like time, knowledge, and available resources put limits on the amount of deliberation that can reasonably be accomplished. For example, General Eisenhower (with the help of staff) deliberated intensely before giving the go ahead for the Allied invasion of Europe in June 1944. The weather, the intelligence, the logistical support, and even the tides were all morally relevant features that figured prominently into a momentous moral decision with immense consequences. The harm caused and the harm prevented by this invasion under those conditions was difficult if not impossible to accurately estimate.

In still other situations moral decisions have to be made in chaotic environments where people have to rely on intuitions developed by training and experience. For example, firefighters make moral decisions in chaotic environments that involve great risk of death, pain, and disability. Firefighters must make snap judgments in rapidly changing conditions, under tremendous stress, and with limited knowledge and resources. Training is crucial to teach inexperienced firefighters sound procedures that work better than other alternatives, so competent decisions will be made that minimize the risk of unnecessary harm. When confronting alternative actions, a fireman's best virtue is often to simply be decisive and take initiative in spite of uncertainty and second-guessing by colleagues. This virtue is critical in chaotic conditions

because morally relevant features change from moment to moment. In chaotic environments consciously using a cookie cutter moral decision procedure makes little sense.

For Gert, conscientious moral agents should take what he calls "the moral attitude" when considering moral decisions that involve violations of moral rules. All of Gert's three necessary features of justified violations of moral rules are included in his statement of the moral attitude.

Everyone (including myself) is always to obey the rule "Do not..." except when a fully informed, impartial rational person can publicly allow violating it. Anyone (including myself) who violates the rule when a fully informed, impartial rational person cannot publicly allow such a violation may be punished.¹⁸⁴

For Gert, ordinary individuals, persons in professional roles, and large institutions like corporations, militaries, and governments should strive to demonstrate the moral attitude when they make moral decisions that involve proposed violations of moral rules. Moral decision makers should consider what would happen if all acts that share the same morally relevant features as the act being assessed became a public policy. The moral attitude eliminates free riders and parasites that would make exceptions that violate one or more of the three necessary conditions for a justified moral rule violation.

Gert's account of the moral attitude states that weakly justified violations of moral rules may be punished.¹⁸⁵ This is a crucial point though it might seem *prima facie* confusing. If people disagree about whether a moral rule violation is justifiable, then why is it permissible to punish weakly justified violations? Gert provides an example to illustrate why this punishment is justifiable. Governments pass laws all the time that some impartial rational citizens would not publicly allow. If only unjustifiable violations of moral rules were punishable, then governments

¹⁸⁴ MNJ, p 223.

¹⁸⁵ Gert's view that liability to punishment has a close relationship to violations of moral rules and should be part of the moral attitude goes back a long way. The view appears in Gert's article, "Justifying Violence," *Journal of Philosophy*, Vol. LXVI, No. 19, October 1969, p 622-623. Gert thinks moral philosophers categorize too many actions as morally prohibited because these philosophers do not also hold that these violations should be punished. In these cases, morally prohibited is used rhetorically and not seriously, to encourage better behavior, not to enforce required behavior.

could only punish those who broke laws that every impartial rational person could publicly allow to become law. Very few laws meet this condition. Governments have to be able to punish those who break even unpopular (weakly justified) laws, such as when some citizens practice civil disobedience in time of war. Almost every law will be unpopular with someone. It is not irrational to think taxes are too high. Nevertheless, the government may still punish those who do not pay due taxes.¹⁸⁶

Excuses

Talk about the justifiability of violations of moral rules assumes that the agents violating the moral rules are responsible for their actions. However, it is not always the case the moral rules are violated by moral agents who are responsible for what they do. For Gert, many factors may be present that adequately excuse someone from moral responsibility for the moral rules that they violate. It is important to keep these excuses in mind when assessing the justifiability of particular violations of moral rules in concrete cases. For Gert, excuses are usually offered when someone wants to claim exemption from moral judgment for actions that violate moral rules.¹⁸⁷

Several adequate excuses are what I call general excuses. Any one or a combination of these excuses may be sufficient to totally or partially exempt someone from moral responsibility for a particular action they commit that violates universal moral rules. These excuses are epistemic limitations, duress, time limitations, and institutional pressures.

Examples of actions that violate moral rules but are excused for epistemic reasons are easy to devise. Suppose two competent baseball players are playing catch. Suppose one player

¹⁸⁶ MNJ, p 224. Years ago I received some speeding tickets. In doing so I broke the moral rule "Obey the law", by routinely violating the fifty-five mile per hour highway speed limit. I thought it was a dumb law, particularly where I was living at the time, in the wide open, sparsely populated spaces of rural Texas. Many rational, conscientious people I knew thought this law was a bad law. Although I disagreed with the law, I do not dispute that governments have to be able to enforce these and other unpopular laws. Tax laws provide another example. Many impartial rational people object to certain taxes because they think they are too high, or are used to fund activities they find morally objectionable, like abortion or capital punishment.

¹⁸⁷ MNJ, p 23.

throws a curveball to the other player and the second player misses the ball, causing the ball to hit him in the head and blinding him in his right eye. Assuming both players are competent, it would not be expected that the curveball thrower should have known that his throw would cause pain and disability to the other player. Throwing the curveball violates moral rules but is excused. Or suppose a platoon sergeant receives orders to engage in a flanking maneuver against an enemy position. Also suppose the enemy is aware of this maneuver because they have intercepted message traffic about the attack. Subsequently, the flanking maneuver causes many troops to be injured or killed. The platoon sergeant is excused from moral responsibility for his part in causing the effects of the flanking maneuver if he had no way of suspecting that the enemy was intercepting message traffic.

Duress can also excuse moral agents from culpability for actions that violate moral rules. If someone holds your wife and children hostage and threatens to kill them if you do not, e.g., embezzle one million dollars from the company you work for, the duress may excuse (or reduce your responsibility for) an action that might otherwise be an unjustifiable violation of moral rules.

Time limitations can also excuse moral agents from moral culpability for actions that violate moral rules. For example, suppose an indigent "John Doe" is brought to a hospital emergency room with symptoms of a life-threatening heart attack. Immediate and invasive care is needed to save the man's life. John Doe has no medical records. The attending physician has a professional duty to try to save John Doe's life. In this emergency situation, suppose John Doe is a diabetic and that a medicine administered to him causes his death *because* he is diabetic. Under these circumstances, the attending physician is excused from blame for violating the universal moral rule "Do not kill" since immediate treatment was urgently needed and there was not time to perform a battery of tests that would have been performed under normal circumstances.¹⁸⁸

¹⁸⁸ I am assuming that testing for diabetes is not part of standard ER protocols in these situations.

Finally, institutional pressures may excuse someone from (or minimize their) moral responsibility for harms caused by violations of moral rules. Two examples illustrate this type of excuse. In the medical profession physicians can be pressured by the hospital where they serve to restrict treatments to those that a patient's medical insurance will pay for. For example, a patient's medical insurance may pay for one type of high blood pressure medicine that has potentially more dangerous side effects than a more costly alternative that has no side effects. If the physician complies with hospital policy and the patient experiences these dangerous side effects, the physician may be excused from moral responsibility for a decision he would not have made without the institutional pressure. Moral responsibility may appropriately lie with the hospital and the medical insurer for this patient. In the military profession, suppose a maintenance group commander for a group of fighter jets orders his maintainers to produce a mission capable rate of 80% for a series of crucial combat sorties and declares that failure to produce this mission capable rate will lead to an unfavorable performance report for his maintenance supervisors. Suppose, however, that one of this group commander's supervisors realistically cannot produce more than a 70% mission capable rate for his particular squadron of fighter jets within the safety standards prescribed by maintenance regulations. If the maintenance supervisor compromises maintenance standards to achieve the target mission capable rate, then he may be excused from blame for increasing the probability that harm will be caused to pilots and expensive military assets will be destroyed. The level of moral responsibility that can reasonably be attributed to the maintenance supervisor is contingent on many contextual facts, such as whether the nation he serves is at war or not, and how crucial his planes are to repelling enemy aggression.

These four general types of possible excuses from moral blame do not exhaust the reasons that may excuse someone from moral responsibility for actions that violates moral rules. Other conditions may exempt someone from moral responsibility. Only moral agents are morally

responsible for what they do. If a four-year old sets fire to the house while playing with matches, the child is excused, as is a shark that attacks a person swimming at the beach. People who are brainwashed or hypnotized are not responsible for what they do in those mental states. Persons may also be excused because of volitional disabilities such as temporary insanity, paranoia, or phobias that they cannot control. Finally, persons may be excused from moral responsibility because they have a disability that causes someone harm. For example, a married person who develops multiple sclerosis causes mental pain, loss of freedom, and loss of pleasure for his spouse.

It is important to keep these excuses in mind when considering the justifiability of a proposed violation of moral rules. Assessing the justifiability of proposed violations of moral rules is a process for making moral judgments about actions performed by people who are morally responsible for what they do, and for making informed moral decisions about what to do in particular cases. To say that a violation of moral rules is justifiable is to talk about actions committed by responsible moral agents. To say that a violation of moral rules is excused is to talk about actions committed by individuals who are exempt from moral judgment in a particular case.

The Two-Step Procedure

For a moral decision procedure (including Gert's) to be an effective moral decision making guide in concrete cases, it needs to satisfy a few basic criteria. A moral decision procedure should be described in simple and clear language so that all moral agents can know and understand how to use it. A moral decision procedure should also be an efficient procedure that is not a burden to use. Otherwise, moral agents will not bother to employ it in complex cases. A decision procedure should also be useful for training, e.g., children and professional trainees who will be responsible for making moral decisions in the future. Professional trainees learning from practical experience have a greater need for simple guides such as checklists until morally

acceptable procedures become internalized and competent moral judgment is instilled. If a moral decision procedure is not analogously useful like a checklist, professional trainees will not take the time to use it. Finally, a decision procedure should be a procedure that moral agents, including professionals, would want people under their tutelage to learn, practice, and internalize.

Importantly, an effective decision tool should provide its greatest worth for professionals and other moral agents making moral decisions in controversial cases. Gert believes he has described such a procedure and that this procedure is consistent with the common moral system that moral agents implicitly use. Gert's decision procedure provides a succinct set of questions to isolate morally relevant facts in these cases. Gert's decision procedure accounts for the crucial importance of consequences while taking into account natural human limitations to calculate consequences definitively. His decision procedure also provides a needed publicity condition to guard against the justifiability of allowing a particular person or group to take advantage of someone else's ignorance in order to achieve a personally desirable result that impartial moral agents would not publicly allow. And Gert's decision procedure makes room for mitigating circumstances that may excuse what is viewed in hindsight as a bad moral decision.

For Gert, deciding whether a fully informed, impartial moral agent could publicly allow a violation of a moral rule involves a two-step procedure.¹⁸⁹ This procedure is necessary to assess whether the proposed violation of a moral rule is strongly justifiable, weakly justifiable, or unjustifiable. Gert stresses this point. "Rather, both steps of this two-step procedure are required whenever violating a moral rule is being considered."¹⁹⁰ The two steps Gert puts forward are as

¹⁸⁹ MNJ, p 17-18, 243; CM, p 48; RRI, p 11; "Morality, Moral Theory, and Applied and Professional Ethics," *op. cit.*, p 10-11.

¹⁹⁰ MNJ, p 237. When Gert uses the words "being considered," he implicitly suggests that a violation is being consciously thought about. Routine moral rule violations, such as having a child inoculated against disease or restraining a violently hysterical person, are not "considered" in the thoughtful sense; more complex moral decisions and judgments are. Gert seems to be saying that if a proposed violation of a moral rule requires deliberation, then that deliberation normally will but also should follow the procedure. Correct deliberation should assess morally relevant facts and estimate the consequences of making the violation publicly allowed in all relevantly similar circumstances.

follows. "Moral reasoning involving the violation of a moral rule requires this two-step procedure; the first, specifying the kind of violation, the second, determining the consequences of that kind of violation being publicly allowed."¹⁹¹ In step one, morally relevant facts are gathered. In step two, the consequences of making the action a public policy that everyone knows they can use are estimated.¹⁹²

For Gert, the two-step procedure is a part of the common moral system. He states, "A proper understanding of this two-step procedure for justifying a violation of a moral rule is essential for understanding the moral system to which these rules belong."¹⁹³ Gert's point in describing the two-step procedure is to make explicit the procedure that is a part of the moral system people employ implicitly like the grammatical system. Thus, this procedure it is not one that moral agents normally use consciously unless a complex situation stimulates deliberation. For Gert, a person who has an explicit understanding of the common moral system the way a linguist has an explicit description of a grammatical system will also explicitly understand the two-step procedure.¹⁹⁴

The first step in Gert's two-step procedure is a fact-gathering step. It involves describing the proposed violation in terms of morally relevant facts. Gert defines a morally relevant fact as

¹⁹¹ MNJ, p 236-237.

¹⁹² I use the word 'estimated' here because Gert uses the word in referring to the second step in CM, p 63. In MNJ, p 243 Gert uses the word 'determined' instead. Gert states in CM p 63 that, "The term 'estimated' is used rather than some word like 'determined' in order to make clear that there is no clear procedure for determining the consequences of everyone knowing that this kind of violation is allowed and of everyone knowing that this kind of violation is not allowed." However, Gert is not making a substantial change in his view of the two-step procedure. In MNJ, p 238 Gert says, "Providing a procedure for determining whether some violations of the moral rules are unjustified or strongly justified is not providing a mechanical decision procedure for settling moral questions." Gert also makes the same point in "Justifying Violence," op. cit., p 624. The procedure is a guide for moral decision-making, not an algorithm.

¹⁹³ MNJ, p 157.

¹⁹⁴ I think, for Gert, there is a distinction between understanding the moral system and using the moral system. All moral agents use the system in some measure. Few people can describe it.

“...a feature that if changed, could change whether some impartial rational person would publicly allow that violation.”¹⁹⁵ For example, in two medical treatment situations that are relevantly similar, the fact that one person has diabetes and the other patient does not can be *the* morally relevant feature that determines whether a fully informed moral agent would publicly allow that proposed treatment protocol.

Since the common moral system is an informal system that applies to, and is known and understood by all rational persons, then the two step procedure must also be capable of being explicitly known and understood by all moral agents. If the two step procedure were not understandable and knowable to all moral agents, then the common moral system would also not be understandable and knowable the way Gert argues it is. Thus, for Gert to be consistent in describing a decision procedure that is consistent with the common moral system, that decision procedure must be one that moral agents can comprehend, use, and would publicly accept.

There is no mystery to morally relevant facts from the perspective of common morality. Go back to the complex example I gave about whether to put your aging parent in the nursing home. Conscientious persons will normally weigh this decision carefully using morally relevant facts without consciously thinking about how their consideration of these facts integrate into an actual decision procedure.¹⁹⁶ Persons in that situation will analyze the harms to be caused, avoided, and prevented by the alternatives. They will look at financial considerations, medical diagnoses, the parent and child's beliefs and desires, geographical location, and the reasonable alternatives available prior to deciding on a course of action. Even in chaotic situations like those experienced by firefighters and air traffic controllers, where time, duress, emergencies, and

¹⁹⁵ MNJ, p 227; In CM, p 49. Gert defines a morally relevant fact similarly, as “... a fact such that if it were different it could affect whether a rational person would favor everyone knowing that a violation with these features is allowed.”

¹⁹⁶ Parents and children in this case also might consider facts that are not morally relevant, such as whether a nursing home was built with non-union labor.

institutional pressures necessitate fast decisions, morally relevant facts are assessed intuitively on the scene, and assessed consciously in training situations designed to foster professional competence.

Listing all morally relevant facts would be a futile project. Each case is different and exhaustively complex, with diverse persons, circumstances, laws, beliefs, desires, and ideologies in the mix. The important task, for Gert, is to provide a guide for distinguishing morally relevant facts from irrelevant ones in cases where the moral decisions at stake are complex and where moral agents do not have firm intuitions about what to do. To separate the two, Gert provides a list of ten questions to guide moral agents in isolating the type of violation being considered. To Gert, answers to these questions are always morally relevant facts; every answer could change whether a moral agent could publicly allow the proposed violation in that and all relevantly similar situations.¹⁹⁷ The answers to these questions, Gert says, "is derived from noting the kinds of facts that can change the moral decisions and judgments of impartial rational persons; it is not derived from some *a priori* moral or philosophical principle."¹⁹⁸ Gert does not claim to have created a precise and complete list of questions that allow people to understand every morally relevant fact in every case. Gert's ten questions plus a short explanation for why the answers to these questions are morally relevant follows.

1. *What moral rule is being violated?* Answers to this question are morally relevant facts because violations of one moral rules often requires stronger reasons to justify the violation than another moral rule. For example, it is clear that a proposed violation of the moral rule against

¹⁹⁷ Bernard Gert, "Moral Theory and Applied Ethics," op. cit., p 535. Gert stresses the importance of a way to isolate morally relevant facts all impartial moral agents could know, understand, and publicly accept in all relevantly similar contexts. In this older article, Gert suggests that a complete list of morally relevant features is possible. "The search for a complete list of morally relevant features is an attempt to eliminate the *ceteris paribus* clause." Later he admits such a list could be endless and constantly changing. Thus he shifts later to formulating his ten questions as a guide for isolating morally relevant features in concrete cases rather than trying to state them all in general terms.

¹⁹⁸ CM, p 49.

killing requires stronger reasons to justify violating that moral rule than breaking a promise. Whether the proposed moral rule violation is a case of killing versus breaking a promise can change whether impartial moral agents would publicly allow that violation.

2. *What harms are being caused, avoided, and prevented?* For Gert, answers to this question are ascertained in a way that is similar to the way Bentham's hedonic calculus was proposed to calculate whether an action was morally right or wrong. The difference is that Gert focuses on harms only, while Bentham also included benefits in his calculations. If a proposed violation involves the harm of killing, it is morally relevant to the justifiability that the harm *caused* is death, and it is morally relevant, e.g., that the method of killing is relatively painless and quick compared to other alternatives. It is also important whether the method of killing is precise and *avoids* injuring or killing innocent bystanders or damaging much personal property in the vicinity. It is also morally relevant, e.g., whether the killing *prevents* greater harms by, e.g., stopping a terrorist from detonating a bomb intended to blow up a bus filled with innocent civilians. Generally, answers to this question involve calculating various probabilities, severities, magnitudes of suffering, and distributions of harms. It is also morally relevant whether the harms caused, avoided, or prevented are done intentionally or unintentionally, or are foreseen or unforeseen. Each of these considerations can affect whether impartial moral agents could publicly allow a proposed violation of a moral rule.

3. *What are the relevant desires and beliefs of the person toward whom the rule is being violated?* Chief among the relevant desires and beliefs that can change whether impartial moral agents could publicly allow a proposed violation are whether the person or persons towards whom the moral rule(s) are being violated want the rule violated in a particular case. For example, suppose two individuals have suffered severe burns in a chemical fire that requires many surgeries and painful treatments if the individuals are to survive. Also suppose that both patients will be similarly disabled and disfigured regardless of how well the treatments work. It

is morally relevant if one of these patients prefers to die rather than suffer the painful treatments and life long disability and disfigurement, while the other is highly motivated to survive. These desires clearly influence whether impartial moral agent would publicly allow not treating these patients. No moral agent would, *ceteris paribus*, publicly allow treating the patient who wants to die and not treating that patient who wants to live. Many moral agents would publicly allow not treating the patient who wants to die and treating the patient who wants to live. Relevant beliefs and desires are also related to the rationality of the moral agent towards whom the moral rule is being violated. If the burns on the aforementioned patients are not severe, in other words, recovery is likely with no disability and some permanent scarring after many painful treatments, and the first patient still wants to die, then he may be acting irrationally. Determining rationality is crucial for assessing whether valid informed consent is required and whether paternalistic treatment is justifiable.

To give another example, suppose two patients both need to have surgery for the same potentially lethal aneurysm. If one of these moral agents is a Jehovah's Witness, his beliefs motivate his refusal to accept blood transfusions. His beliefs may sufficiently change the risks of surgery and thus change whether physicians would be willing to risk this surgery without the availability of transfusions. His beliefs also affect whether other treatment options, not seriously considered prior to knowing his beliefs, should be tried instead.

4. *Is the relationship between the person violating the rule and the persons toward whom the rule is being violated such that the former has a duty to violate moral rules with regard to the latter independent of their consent?* Answers to this question are clearly morally relevant. This question accounts for the fact that governments are morally permitted to tax citizens without their consent (deny them some freedom and pleasure) to prevent harms (funding police and the military) and promote goods (build schools and improve roads). Impartial moral agents publicly accept governments taxing citizens for these reasons, but few or no moral agents would publicly

accept a private but powerful individual citizen forcibly taxing citizens to prevent harms and promote goods. Many other examples demonstrate the moral relevancy of this question. A parent is justified, in virtue of having specific parental duties in violating moral rules with regard to her children that other moral agents are normally not permitted to violate towards those children. A soldier is justified under certain limitations to kill enemy soldiers in virtue of his professional duties. Ordinary civilians are normally not permitted to do this.

5. *What goods (including kind, degree, probability, duration, and distribution) are being promoted by the violation?* For Gert, the answers to this question are morally relevant; however, this question normally only applies only to governments and a few other groups like parents and teachers. Governments may tax citizens to promote goods like parks and the arts. Parents may deny freedom to their children to make them learn a musical instrument. Teachers may force students to remain in class for their own educational good. Unless the harms caused outweigh the good promoted, impartial moral agents would publicly allow these violations of moral rules to promote goods. This question is closely related to the previous question, because it is morally relevant that the groups violating moral rules to promote goods are doing so because they have a duty to do so.

6. *Is the rule being violated toward a person in order to prevent her from violating a moral rule when the violation would be unjustified or only weakly justified?* This question addresses the issue of justifiable violations of moral rules (causing harm) to fulfill moral ideals (prevent harm). It is morally relevant, e.g., that a person engaged in deception is an undercover policeman trying to infiltrate and stop drug trafficking, compared to deception simply to gain a personal advantage that one is not entitled to. It is morally relevant that an instance of killing stops a suicide bomber from blowing up a bus filled with civilians compared to killing an adulterous spouse. It is morally relevant that parents forcibly move their children to another town to prevent them from continuing to socialize with other children engaged in criminal activities. It

is morally relevant that a psychiatrist institutionalizes an individual for a short period of time to prevent them from acting on a temporary homicidal rage towards someone who betrayed them. Each of these examples are cases of justifiable violations of moral rules that most, if not all, fully informed impartial moral agent would publicly allow.

7. Is the rule being violated toward a person because he has violated a moral rule unjustifiably or with only a weak justification? For Gert, the answers to this question are morally relevant and involve punishment for previous unjustifiable or weakly justifiable violations of moral rules. It is morally decisive that a person is put in prison for sexually abusing young children rather than being incarcerated for being a professing Christian (which violates no moral rule). It is morally relevant that a parent restrict her teenager to the house for a week for failing to obey that parent's curfew or for failing to complete assigned chores. To restrict her teenager to the house for no reason at all or for failing to complete a trivial task would be excessive.

For Gert, it is important to include the possibility of punishment for weakly justifiable violations of moral rules. To illustrate, if the government could not issue speeding tickets to citizens unless all moral agents publicly accepted those speed limits, it would paralyze the government. Very few laws enjoy unanimous acceptance by moral agents affected by those laws. This question also covers the justifiability of punishment for acts of civil disobedience. Although all informed moral agents do not agree with particular decisions to punish civil disobedient citizens in particular situations, most moral agents agree with the justifiability of punishing civil disobedience in principle, assuming the punishment administered fits the crime. If an environmentalist puts iron spike in trees to stop loggers from cutting down trees, the potential risks of severe injury and death to loggers caused by these actions may warrant imprisoning these environmentalists. If, however, the environmentalists hinder logging operations in less hazardous ways, then lesser punishments are probably appropriate.

8. *Are there any alternative actions or policies that would be preferable?* Answers to this question are obviously morally relevant facts. For example, if the same result can be obtained by one action that violates a moral rule or another action that violates no moral rules, then, *ceteris paribus*, the second alternative should be chosen. Likewise, alternatives each may violate different moral rules, or violate the same moral rule with less severity. If one alternative causes permanent disability while the other alternative causes temporary but moderate to severe pain, those facts are morally relevant to whether which alternatives moral agents would publicly allow. Also, if one alternative causes more pain than another alternative but both alternative produce the same result, then these levels of pain could influence what moral agents would publicly allow. Decisions made during war are routinely made with this question in mind. If the military needs to destroy a bridge of strategic importance to enemy forces, it is morally relevant to consider many alternatives that would influence what moral agents would publicly allow. It would, e.g., be morally relevant to consider the alternative of destroying the bridge during the middle of the night when few to no innocent civilians are using the bridge rather than destroy the bridge during the day. It is also relevant to consider alternative methods for destroying the bridge that would minimize harms to innocent civilians, such as using a laser-guided bomb instead of inaccurate carpet bombs.

9. *Is the violation being done intentionally or only knowingly?* Answers to this question are morally relevant and account for the moral issues surrounding the principle of double effect. It is morally relevant, e.g., that the violations of moral rules are foreseen but unintended, i.e., if the harms could be avoided, the moral agents performing the action would avoid causing these harms. If in order to cure a patient of bone cancer, a physician has only one alternative, i.e., to remove the patient's leg, then that disability is foreseen but unintended. No conscientious physician would cut off a patient's leg if the same probability of a cure could be obtained by performing a different treatment that causes no disability. In the military profession, it is morally

relevant that injury and death to innocent civilians in enemy territory are caused accidentally rather than intentionally. The difference between foreseen violations of moral rules and intentionally caused violations of moral rules is crucial to whether moral agents would publicly allow those violations of moral rules.

10. Is the situation an emergency such that no person is likely to plan to be in that kind of situation? Whether or not a situation is an emergency is sometimes a morally relevant fact and can influence what moral agent would publicly allow. For example, in situations where many people have been injured and available medical resources are limited, medical personnel are morally permitted to treat those who have a better chance of survival first. In nonemergency situations abandoning those with poor prognoses to treat those with better prognoses is morally permissible. To discriminate in this way in routine medical practice is normally not morally permitted. Moral agents can publicly accept the fact of triage in emergency situations without this knowledge affecting their behavior and increasing their anxiety levels. However, if moral agents knew that this practice was used in routine medical practice, that knowledge would seriously affect moral agents' behavior with regard to seeking routine medical care. Patients' anxiety levels would increase substantially.¹⁹⁹

For Gert, while the answers to these questions are all morally relevant when applied to a specific case, these questions are not necessarily the only such questions. Each of these questions is general; more specific questions tailored to concrete cases may be appropriate, though it seems that more specific questions could be viewed as derived from this list of ten. For Gert, the discovery of morally relevant features is needed in both theoretical and applied/professional ethics. Gert states,

¹⁹⁹ Gert discusses each of these questions in MNJ, p 227-235, and CM, p 49-61. They are also listed (though they are phrased differently) in "Morality, Moral Theory, and Applied and Professional Ethics," op. cit., p 17-18, and in his article "Morally Relevant Features," *Metaphilosophy*, Vol. 30, Nos. 1/2, January/April 1999, p 13-24.

I believe the discovery of these [morally relevant] features is one of the most important tasks of theoretical and applied and professional ethics and that those who work in applied and professional ethics are most likely to discover new ones.²⁰⁰

Gert is optimistic that his list of questions can isolate the morally relevant facts of a particular case, but he is careful to leave the door open for more to be formulated. He states, "The answers to this list of questions *seems* to me to include all the *important* morally relevant features."²⁰¹ He also states,

The point of the list of questions is to guide the search for morally relevant facts. Everyone admits that the solution to most moral problems depends on discovering all the relevant facts, but previously there has been no guide to help one determine which facts are morally relevant. I have shown that those facts which provide answers to any question on the list of ten questions may be a morally relevant fact. This list is not a checklist that one must explicitly go through when considering an violation of a moral rule, for it will often be obvious what the answer to some of these questions are. For example, question 7 never arises in making moral decisions in medicine.²⁰²

The second step Gert's two-step procedure is the step where consequences are estimated and where the concepts of impartiality, publicity, and rationality are employed. In this step, moral agents estimate the effects of the proposed violation being publicly allowed versus estimating the effects of this type of violation not being publicly allowed. This step is a formalized version of a question that ordinary rational people frequently ask when evaluating whether to act a certain way, or people ask the question of their children or subordinates to get them to think beyond themselves. "What if everyone knew that they were allowed to do this?" This rhetorical question is meant to get persons to consider the consequences of allowing that action to be routinely allowed, i.e., not merely as an exception for oneself. Gert phrases it this

²⁰⁰ Bernard Gert, "Morality, Moral Theory, and Applied and Professional Ethics," op. cit., p 17. Gert's own experience bears this quote out. In this 1992 article, Gert's list of ten questions to guide the discovery of morally relevant fact does not include a question explicitly asking if the situation where the violation of moral rules is being considered is an emergency. In an email to me in March 2003, Gert mentioned that his experience serving on hospital ethics committees prompted him to add the question about emergencies to his list to account for situations where, e.g., triage decisions have to be made. The question about emergencies appears in his work starting in 1998 in MNJ.

²⁰¹ MNJ, p 227. my italics.

²⁰² MNJ, p 235.

way, "What effects would this kind of violation being publicly allowed have?"²⁰³ Gert's formulation is more precise because "being publicly allowed," suggests that the proposed violation should be considered as an accepted practice or policy. For Gert, the answer to this question is morally decisive and determines whether a proposed violation is strongly justifiable, weakly justifiable, or unjustifiable.

Step two illustrates that, while consequences are important in making moral judgments, consequences are not the only relevant consideration in considering a proposed violation of a moral rule. The proposed violation must be publicly allowed by at least some fully informed impartial moral agents. This publicity condition eliminates counterintuitive alternatives that seem, *prima facie*, to produce better consequences on balance, such as using prisoners in maximum-security penitentiaries as forced organ donors.

All of the interesting cases involving proposed violations of moral rules are weakly justifiable. These cases generate the most controversy and moral disagreement among informed moral agents. Gert argues that his description of common morality accounts for the fact of disagreement without collapsing into complete relativism. For Gert, a moral theory that does not account for the fact of disagreement and provide a coherent explanation for why some moral disagreements are irresolvable is an inaccurate description of common morality.

Moral Disagreement

Gert's description of the common moral system, including his succinct two-step procedure cannot completely eliminate the fact of moral disagreement. Some moral disagreements are irresolvable. Gert states, "The theory I present differs from others in that it does not claim to provide a unique answer to every moral question, but allows that in many situations there may be more than one acceptable answer."²⁰⁴ To Gert, moral agents can disagree

²⁰³ MNJ, p 236.

²⁰⁴ Bernard Gert, "Moral Theory and Applied Ethics," op. cit., p 533; MNJ, p 228, 237; CM, p 13.

about four things: the scope of morality, the rankings of various goods and evils, the estimated consequences of a particular action, and interpretations of a moral rule. For Gert, moral theory cannot resolve these four kinds of disagreements.²⁰⁵

As a result, human beings should only expect consensus on very clear-cut moral decisions, which, for Gert, covers the overwhelming majority of cases.²⁰⁶ In most situations, obeying the moral rules is morally required and following the moral ideals is usually morally permitted.

Moral agents disagree about the scope of morality when they disagree about who should be included in the group that is protected by the common moral system. Some moral agents want to include fetuses and others do not. Other moral agents want even to include all sentient creatures in the protected group. For Gert, these disagreements are frequently the result of emotional attachments. Although infants are not moral agents, moral agents almost universally agree that morality requires including them in the group protected by morality.²⁰⁷

Moral agents also disagree in how they rank goods and evils. This fact is illustrated on every highway in the way different people drive automobiles. Some persons drive at a very conservative speed while others drive as fast as they can get away with. It is just a fact that some drivers value safety over speed, while other drivers are willing to accept higher risks for the sake of speed. The issue of gun control also illustrates how moral agent rank goods and evils differently in a more controversial political issue. Assume for a moment that there was total agreement on the facts and that increased gun control would prevent more gun related harms. Even if we knew exactly what the results of more gun control laws would be, moral agents would still disagree on how they ranked these harms and benefits. Some people would rather suffer a

²⁰⁵ CM, p 72.

²⁰⁶ CM, p 5; MNJ, p 4.

²⁰⁷ MNJ, p 144-146.

marginal increase in the probability of harm in order to preserve the freedom of law-abiding citizens to own and use guns. Other moral agents would rather guns were made illegal. Moral theory cannot resolve issues like these with any finality.²⁰⁸

Moral agents may also disagree as to their estimates of the consequences of a proposed violation being publicly allowed versus the consequences of the proposed violation not being publicly allowed. The gun control issue illustrates this source of disagreement too.

Disagreements over consequences are a driving factor in the current gun control debate in the United States. For example, proponents of gun control argue that restrictions on gun ownership would reduce crime. Opponents of gun control argue that such restrictions would increase crime since law-abiding citizens would be defenseless against criminals who would find a way to acquire guns illegally.²⁰⁹

Finally, moral agents may have moral disagreements about how to interpret the moral rules. Everyone agrees that "Do not kill" is a moral rule that must be obeyed unless a justifiable exception to the rule can be made. However, it is not always clear what it means to kill in controversial cases. For example, moral agents can disagree as to whether removing a patient from a respirator is killing or merely allowing someone to die by natural causes. Moral agents can disagree whether refusing some medical treatments that stand a fair chance of being effective is suicide or not. Moral agents can disagree as to whether an abortion is killing or not.²¹⁰

Although the common moral system cannot resolve all moral disagreement, Gert thinks the two-step decision procedure provides a tool that can limit it. Gert states, "This explicit account of the moral rules, the morally relevant features, and the two-step procedure for justifying

²⁰⁸ Bernard Gert, "Moral Theory and Applied Ethics," op. cit., p 541.

²⁰⁹ CM, p 13; Bernard Gert, "Moral Theory and Applied Ethics," op. cit., p 541.

²¹⁰ CM, p 13.

violations is intended to provide a limit to genuine moral disputes.”²¹¹ The most common source of resolvable moral disagreements is disagreements over the facts of the case. Gert’s ten questions are a succinct guide that can assist moral agents in isolating what facts are morally relevant to a particular case. Sometimes gathering more facts can eliminate these disagreements.²¹² About moral decisions in concrete cases Gert says, “But often there seems to be an unresolvable difference when a careful examination of the issue shows that there is actually a correct answer.”²¹³ A clearer grasp of morally relevant facts is crucial to increasing the possibility of reaching moral consensus. Gert states, “When we agree on all of the relevant facts of a particular case, then we usually agree on the moral judgment that we make concerning that case.”²¹⁴ And in his own experience on a hospital ethics committee, Gert notes, “In serving over ten years on a hospital ethics committee we had almost no disagreements that did not turn out to be disagreements about the facts of the case.”²¹⁵

Some moral disagreements are resolvable but only after many years, perhaps centuries of collective human experience. However, in concrete cases, these disagreements can seem irresolvable. These moral disagreements tend to be ideological. For example, soon after the discovery of airplanes, a few military visionaries such as Brigadier General Billy Mitchell anticipated the value of projecting airpower on the battlefield by thinking of theaters of operations in three dimensional, rather than two-dimensional terms. Army, Navy, and congressional leaders rejected these proposed innovations for a variety of reasons, such as the potential harms that would be caused by diverting more funds from already depleted land and naval forces. Over time

²¹¹ MNJ, p 239.

²¹² I say “sometimes” here because humans have epistemic limitations that make understanding every morally relevant fact impossible.

²¹³ Bernard Gert, “Morality, Moral Theory, and Applied and Professional Ethics,” *op. cit.*, p 19.

²¹⁴ *Ibid*, p 7.

²¹⁵ *Ibid*, p 23.

disagreements over the estimated consequences of developing or not developing military airpower were made clear in the Second World War. There is no longer a disagreement about the value of airpower to the military forces.²¹⁶

According to Gert, accepting the fact of irresolvable moral disagreement and accepting the two-step decision procedure as a useful tool has several benefits. Moral agents who understand that some situations have more than one morally acceptable alternative are more willing to compromise and less prone to dogmatic moral rigidity. Diplomats and arbitrators do this sort of thing all the time; they help involved parties clarify issues at stake and work out compromise solutions that conflicted parties can accept. When people realize that there are acceptable alternative courses of action in controversial cases, then people can make compromises without feeling as if they have compromised their moral integrity.

For Gert, accepting the fact of irresolvable disagreement and the two-step decision procedure also has the benefit of making discussions about alternative courses of action in controversial cases more fruitful. If a person holds the view that every moral problem has one acceptable answer and believes strongly in only one alternative in a particular case, then to be consistent that person has to think that the opposing party is partial, irrational, or ignorant, and therefore in moral error. Accepting the fact of disagreement makes discussions about the morally relevant facts and the estimated consequences gleaned by using the two-step procedure more cooperative and less competitive. It makes people more open to seeing what facts are morally relevant. It makes it easier to isolate those facts that are the source of a particular moral

²¹⁶ This example only illustrates one case where an ideological difference was resolved over time. Many ideological disagreements are not resolvable. Many of these are religious and political disagreements that concern different views of human nature. For Gert, when considering a moral decision that must be made in a concrete case, restricting beliefs considered to rationally required beliefs could help ameliorate some of these disagreements.

disagreement. If disagreement is not about the facts, it helps to isolate where the source of disagreement really lies.²¹⁷

When discussants accept the fact of irresolvable disagreement, they are also more willing to accept the decisions of leaders and supervisors who are authorized to make moral decisions in controversial cases without rancor or malice.²¹⁸ Even though some moral disagreements are irresolvable, moral decisions involving controversial cases normally have to be made by those in positions of authority. The rightful source of many of these decisions lies with governments.

Governments make decisions and pass laws that pertain to each of the sources of irresolvable moral disagreement; the scope of morality, the ranking of various goods and evils, the estimated consequences of a particular action, and interpretations of a moral rule. Governments make decisions on the scope of morality when they regulate abortion. Governments rank various goods and evils when they pass laws requiring automobiles to meet safety or fuel economy standards. Governments may set punishments for certain offenses based on an estimates of the beneficial consequences of denying a criminal freedom versus allowing that person to go unpunished or serve a lighter sentence. And governments interpret moral rules when passing laws that permit passive euthanasia, or permit the military services to inflict a certain but limited amount of pain on recruits as a function of military training. For Gert, if governments were not empowered to pass laws and make policy decisions that settled some irresolvable moral disputes, they would be unable to govern, and people would not be able to depend on a consistent set of standards on a host of important issues, from food safety and building codes, to banking practices and court procedures. In spite of disagreements over the particulars of individual laws, most fully informed impartial moral agents agree that less harm is

²¹⁷ MNJ, p 238-239.

²¹⁸ CM, p 125-126.

caused when governments to make many of these important decisions and pass laws to standardize behavior.²¹⁹

Summary

Gert states, "Morality is an informal public system applying to all rational persons, governing behavior that affects others, and includes what are commonly known as the moral rules, ideals and virtues and has the lessening of evil or harm as its goal."²²⁰ He also says, "A proper understanding of the two-step procedure for justifying a violation of a moral rule is essential for understanding the moral system to which these rules belong," and "...both steps of this two-step procedure are required whenever violating a moral rules is being considered."²²¹ This two-step procedure may be stated simply as (1) gather the morally relevant facts and (2) determine whether the proposed violation of moral rules is justifiable or unjustifiable, and if it is justifiable, whether it is strongly or weakly justifiable.

In this chapter I provided an account of Gert's explicit description of common morality that he argues all moral agents use, at least implicitly, to make moral decisions and judgments. This account included an explanation of the moral rules, ideals, and virtues. It also included a conceptual analysis of those concepts that Gert argues are crucial to providing an *accurate* description of the common moral system. These concepts are rationality and irrationality, impartiality, and publicity. I also discussed Gert's procedure for assessing the justificatory strength of proposed violations of moral rules. The procedure for making these assessments involves two steps, which Gert also claims moral agents use implicitly to make moral decisions and judgments in controversial cases. Gert provides ten questions as a guide for isolating morally relevant facts in concrete cases (step one). I also provided an explanation and gave examples

²¹⁹ MNJ, p 367, 370.

²²⁰ MNJ, p 13.

²²¹ MNJ, p 157, 237.

illustrating why Gert argues that answers to these questions are morally relevant. I also explained what Gert claims is the pivotal second step of his decision procedure. It involves asking the morally decisive question, namely, "What would the effects of this kind of violation being publicly allowed have?"²²² For Gert, since human beings fallible, which includes having epistemic limitations, the effects of a violation can only be estimated with varying levels of accuracy depending on the case being considered. Moral agents should estimate these effects conscientiously and attempt to be accurate, but a complete grasp of the actual consequences of a kind of violation being publicly allowed is a practical impossibility. Gert has provided a description of the common moral system that he argues works without providing the counterintuitive results of competing moral theories, each of which fall prey to the temptation to replace common morality with moral theory rather than describe common morality in a concise and complete theory.

In the next chapter, I turn to discuss how Gert has actually applied his description of common morality, including the two-step moral decision procedure, to concrete and controversial cases in medical ethics. I will examine four of his medical ethics case analyses with the goal of assessing whether and if so how well Gert actually employs his theory and decision procedure in the trenches of medical practice. This next chapter pave the way for my later effort to investigate whether his theory and decision procedure can work, and if so, how well it can work, in controversial professional military ethics cases.

²²² MNJ, p 237.

CHAPTER 4 GERT'S CONTRIBUTION TO CONTEMPORARY MEDICAL ETHICS

Introduction

In order to determine whether Gert's description of the common moral system is equal or superior to other major ethical theories as a useful guide for dealing with ethical issues, it is necessary to test whether his theory is an effective practical tool for making moral decisions and judgments in concrete situations encountered in at least one major profession. Passing this test would show that Gert's description of common morality is, as he puts it, "systematic, accessible, and usable."¹ If professions, as Gert claims, are just another subculture to which the common moral system applies, his theory ought to be useful in professional military ethics as well as he argues it is in medical ethics.²

Success in applying a moral theory and its associated decision procedure to concrete professional ethics cases is determined by the theory's ability to serve as an effective tool for framing the moral issues involved in a particular case, for providing a guide to isolating morally relevant facts, and for providing a useful procedure for identifying and comparing realistic options in light of epistemic limitations, time constraints, duress, and institutional pressures. Gert recognizes the limitations of applying moral theory, including his own theory, to professional ethics.

Contrary to the standard view, that the theoretical part of ethics is more intellectually demanding than applying the moral system to different professions and fields, the reverse is more often the case. The most intellectually demanding aspect of providing an adequate general account of morality is avoiding the seductive simplicity of the standard moral theories; realizing that providing a list of moral rules is only the beginning of an adequate account of morality. Determining what counts as a person's duty in a particular

¹ Bernard Gert, Charles Culver, and K. Danner Clouser, *Bioethics: A Return to Fundamentals*, New York: Oxford University Press, 1997, p 10. Hereafter when referring to this work in this chapter I will use the letters 'BRF' followed by the relevant page numbers.

² BRF, p 1.

profession in some society, requires a much more subtle examination of the ways in which members of that profession in that society regard the behavior of their fellow professionals.³

In this chapter and the next I will illustrate Gert's decision procedure in action, examining how Gert uses his description of common morality and his decision procedure to frame and assess controversial professional ethics cases. I will investigate how Gert actually employs his moral decision methodology in concrete cases and whether Gert's theoretical machinery works as he claims it does to provide a useful guide for professional ethics. I will also illustrate how Gert has employed his decision procedure in action to analyze four medical ethics cases and then analyze whether he has been successful in doing so.

Gert's Credentials

Gert's credentials as an influential philosopher in the field of medical ethics are impressive. He is the Stone Professor of Intellectual and Moral Philosophy at Dartmouth College, where he has served in various capacities, including department chair, since 1959. Over the last four decades, he has also served as visiting professor at The Johns Hopkins University (1967-1968), Edinburgh University (1974), The Hebrew University of Jerusalem (1985-1986), and the Nacional Universidad de La Plata and Universidad de Buenos Aires (1995). Gert has also served as the Eunice and Julian Cohen Professor for the Study of Ethics and Human Values at Dartmouth College, and he has served as Adjunct Professor of Psychiatry at Dartmouth Medical School continuously since 1976. Currently, Gert teaches courses on *Philosophy in Medicine* and *Ethical Theory*.

Gert has published numerous books and articles on many topics related to professional medical ethics. He has authored or coauthored three books on medical ethics, *Philosophy in Medicine: Conceptual and Ethical Issues in Medicine and Psychiatry* (Oxford: 1982), *Morality and the New Genetics: A Guide for Students and Health Care Providers* (Jones and Bartlett, 1995),

³ Bernard Gert, "Morality, Moral Theory, and Applied and Professional Ethics," *Professional Ethics: A Multidisciplinary Journal*, vol. 1, nos. 1 & 2, Spring/Summer 1992, p 15.

and *Bioethics: A Return to Fundamentals* (Oxford: 1997). Chapters and excerpts of his *Philosophy in Medicine* have appeared in other influential medical ethics anthologies, including *Contemporary Issues in Bioethics*, 2nd edition, edited by Thomas Beauchamp and LeRoy Walters (1982), *Biomedical Ethics*, 2nd and 4th editions, edited by Thomas Mappes, Jane Zembaty, and David de Grazia (1986 and 1996), and *Bioethics Readings and Cases*, edited by Baruch Brody and H. Tristram Englehardt, Jr. (1987). Chapter 10 of his *Morality and the New Genetics* has been translated into Spanish and been reprinted in the journal *Perspectivas Bioeticas*, Ano 3. Numero 7/8 (1999). Gert also edited *The Journal of Medicine and Philosophy*, Vol. 11, No. 2, May 1986 on the subject of "Rationality and Medicine."

Gert has also published over fifty scholarly articles on medical ethics that have appear in such scholarly medical ethics journals as *The Journal of Medicine and Philosophy*, *The Annals of Internal Medicine*, *Psychiatric Medicine*, *The New England Journal of Medicine*, *The Hastings Center Report*, and *Theoretical Medicine*. Many of Gert's scholarly articles have been reprinted in medical ethics anthologies such as *Ethical Issues in Death and Dying*, *Value Conflicts of Health Delivery*, *Biomedical Ethics*, and several editions of the influential *Contemporary Issues in Bioethics*, by Thomas Beauchamp, James Childress, and LeRoy Walters. A few of Gert's scholarly articles have been translated and reprinted in German and Spanish scholarly journals and texts.

From 1990-1993, Gert was awarded the first grant awarded by the National Institutes of Health to investigate "Ethical Issues Arising From The Human Genome Project." He served as the principal investigator and researcher for this project. The momentous ethical and legal implications of this project for individuals and society in medical ethics, law enforcement, government policy development, and potential abuses of mapping the human gene are testimony to Gert's reputation as a medical ethics scholar and researcher. Gert's philosophical conclusions on the facts and ethical implications of this project can be found in his *Morality and the New Genetics: A Guide for Students and Health Care Providers* (1995).

Gert is a cofounder of Dartmouth's Institute for the Study of Applied and Professional Ethics, which serves Dartmouth College, Dartmouth Medical School, Dartmouth's Thayer School of Engineering, as well as Dartmouth's Tuck Business School. Approximately 150 Dartmouth faculty and administrators are engaged in researching and discussing applied and professional ethical issues, coordinating symposia, hosting conferences, and preparing ethics curricula for various Dartmouth degree programs. Recent medical ethics programs include conferences on the ethics of long-term neonatal intensive care, the U.S. response to HIV infection in Africa, the ethics of stem cell research, and the ethical challenges of assisted reproduction services.

Gert's reputation as a medical ethics expert is reinforced by considering the numerous presentations on medical ethics he has made over the years at medical schools and other prestigious forums where medical ethics issues are discussed. Among these venues includes The Johns Hopkins University, National Institutes of Health, The Mount Sinai School of Medicine, Harvard School of Public Health, the Veterans Health Administration Ethics Advisory Committees Conference, and the Hastings Center Workshops. He has also made numerous international presentations on medical ethics at such venues as the University of Toronto Medical School, Tel Aviv Medical School, Ben-Gurion University Medical School, the Fundacion Foro Argentino de Biotecnologia, and the Universitat Essen Medical School.

Since 1986, Gert has been a Fellow of the Hastings Center, a prestigious nonprofit organization dedicated to exploring fundamental ethics questions of health care, biotechnology, and the environment.

Gert's Response to Recent Trends

Gert wants to show that his description of the common moral system and the two-step procedure are useful practically and not just interesting philosophically. To support his view, he thinks it is necessary to show that his position is better than the most popular contemporary alternatives. Gert is critical of a trend in medical ethics in the last few decades to frame medical ethics decisions in terms of quandaries and dilemmas. For Gert, this trend is a consequence of

applying what he calls the "anthology method" of case analysis. In the anthology method, authors provide abbreviated descriptions of several popular moral theories. Then, usually implicitly, anthology method proponents leave it up to the medical professional to decide in each case which theory, or which parts of various theories seem most relevant to a particular case. As a result, one moral theory may be emphasized as the right tool to help solve one kind of medical ethics issue and another moral theory may be emphasized to solve a different type of issue.⁴

Gert asserts that the anthology method provides medical professionals little in the way of systematic moral guidance. To Gert, the implication that medical professionals draw is that moral theory provides an alphabet soup of conflicting theoretical alternatives for decision making, leading at times to statements such as "A Kantian would do this in this case" but "A consequentialist would do that in this case."⁵ To Gert, the result is that moral theory loses credibility and is generally ignored by medical professionals responsible for making hard moral decisions in complex and chaotic cases. For Gert, only when moral theory is a unified description of the concepts and features of the common moral system that all moral agents at least implicitly know and understand can it regain its reputation as a useful tool in the trenches of professional practice. Gert's theory accounts for the importance of consequences, impartiality, and publicity in a systematic whole.⁶

Gert focuses his criticism of the anthology method on what has become the dominant paradigm in medical ethics over the last three decades. Thomas Beauchamp and James Childress

⁴ BRF, p 2-3.

⁵ It is possible that most of the time that different moral theories will support the same answer to a given moral problem. Even if this is true given a more nuanced analysis of the theoretical alternatives, Gert argues that medical professionals do not see the moral theories this way because they lack time and desire to delve that deeply into moral theory. As a result, the anthology method gives medical professionals the impression that moral theory is not useful. See BRF, p 2.

⁶ BRF, p 2. Gert's theory accounts for alternatives and recognizes moral conflict also, but under the auspices of a comprehensive description of the common moral system. Alternatives are not the result of applying different theories to complex cases, but a fact of life in the medical profession.

espouse this view in their first three editions of *Principle of Biomedical Ethics*.⁷ Their 'principlism,' as Gert labels it, is a *prima facie* rule theory based on four principles: autonomy, beneficence, nonmaleficence, and justice. For Beauchamp and Childress, these four important moral principles are meant to serve as general action guides.⁸ To Gert they end up serving as checklists in practical contexts, i.e., as things medical professionals should consider when considering a moral problem in medicine, yet they do not embody a clear, established, and coherent moral system capable of providing useful moral guidance in particular cases.

For Gert, principlism is weak for several reasons. Connections between the principles are not clearly stated and explained. Medical professionals may intuitively choose the moral principles they think are most relevant to making medical ethics decisions in concrete cases, assuming that they use the theory at all. To Gert, principlism provides no advice or guidance for how to prioritize these principles when making moral judgments. The result is a disparity of applications in concrete cases depending on the preferences of the medical professionals involved. And principlism provides no decision procedure to guide medical professionals in how to adjudicate between conflicting principles in complex cases and how to discover and assess morally relevant features.⁹ This leads to inconsistent application of these same principles.¹⁰

⁷ In their fourth edition, Beauchamp and Childress amend their theory to address strong criticisms of their "anthology view" in the scholarly literature. Ezekiel Emanuel thought the amendments of Beauchamp and Childress moved so far from their original principlism that he titled his review of the fourth edition, "The Beginning of the End of Principlism." Ezekiel Emanuel, "The Beginning of the End of Principlism," *Hastings Center Report*, vol. 25, 1995, p 37-38.

⁸ Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 2nd Edition, New York: Oxford University Press, 1979, p 5.

⁹ BRF, p 75.

¹⁰ Gert is critical of principlism as far as it purports to be a useful theoretical account of morality. Gert holds that the work of Beauchamp and Childress is good, however, in providing good insights into particular moral problems in medicine; it raises sensitivity to fundamental medical ethics issues such as problems of confidentiality, paternalism, competence, and informed consent. See BRF, p71. It is not that the principles that Beauchamp and Childress espouse are bad principles. They are not. However, beyond customary ethical and legal practice, they are not supported by a coherent description of common morality that illustrates what all rational people want to avoid unless they have adequate reason to the contrary. It should be noted that, even though the principlism of Beauchamp and Childress is the dominant paradigm in medical ethics today, it is clearly not without competitors, in addition to Gert's theory of moral rules.

Lastly Beauchamp and Childress do not discuss the important relationship between the medical profession and the common moral system, articulating the obligation of medical professionals to obey the universal moral rules unless an exception is justifiable.¹¹

Gert's argues that the medical ethics he articulates is an improvement over principlism for the following reasons. To Gert, his medical ethics overcomes the problems in principlism while salvaging what is beneficial in it. His medical ethics provides a more useful, understandable, and intuitively correct account of medical ethics that dovetails cleanly with the common moral system that all rational moral agents know, understand, and implicitly use. Gert's theory subsumes medical ethics under a moral framework that applies to all moral agents. His theory provides a clearer account of key concepts related to the practice of making moral decisions in concrete medical cases. And his theory provides analyses of particular cases where these concepts are in conflict, demonstrating his theory at work in proposing solutions to the problems raised by these cases. Beauchamp and Childress provide many cases but without analyses of proposed solutions.¹²

Veatch and Engelhardt espouse a 'respect for persons' approach grounded in a social contract view that stresses the principle of autonomy. Hare, Singer, Parfit, and Harris's account of medical ethics stresses utilitarian foundations through the universal duty to benefit others as much as possible. Daniels articulates a Rawlsian justification for medical ethics based on social justice considerations derived from Rawls liberty principle and his maximin solution to problems of social justice. Kuczewski espouses a 'communitarianism' that applies MacIntyre's virtue theory to medical ethics. An exhaustive comparison of Gert's theory to each of these alternatives would be a dissertation in its own right. I only want to look at and assess whether Gert's theory of moral rules, particularly the two-step decision procedure, is useful in its own right as a guide in medical ethics cases and whether his procedure is consistent with a his description of the common moral system.

¹¹ BRF, p 75-76. Interestingly, Beauchamp and Childress provide many excellent case studies in their books. However, these cases studies are simply provided and not discussed. No attempt at analyzing these cases is provided and there is no discussion of a method of case assessment.

¹² For example, in their second edition, Beauchamp and Childress provide thirty-five case studies with no analyses of proposed solutions or alternative solutions that might follow from applying their principlism to those cases. Tom Beauchamp and James Childress, *Principles of Biomedical Ethics*, 2nd Ed, New York: Oxford University Press, 1979, p 281-328. Beauchamp and Childress's later editions answer criticisms of principlism in such a way that Ezekiel Emanuel proclaimed their changes "The Beginning of the End of Principlism." The most current edition of their book is more an anthology of various scholarly articles on medical ethics topics written by a plethora of authors, including Gert. However, Gert's point is not to attack the theoretical views of Beauchamp and Childress *per se*. According to Gert, the anthology view has systemically infected the daily operations of medical professionals in the field. The fact that Beauchamp

Gert and Concrete Medical Ethics Cases

Gert's goal for applying his moral theory and two-step decision procedure to complex medical ethics cases is not to provide an algorithm or a cookie cutter template for making all controversial medical ethics decisions. As a matter of fact, Gert does not normally apply his two-step procedure in a clear step-by-step fashion that is obvious to the reader. He does not systematically walk through the answers to each of the questions he proposes for isolating the morally relevant features in concrete cases that involve proposed violations of moral rules. However, he always attempts to answer what he considers to be the morally decisive question in step two of his decision procedure, i.e., "What effects would this kind of violation being publicly allowed have?"¹³ Gert's aims are admittedly modest. His intention, as he states, "is to provide the moral framework and the conceptual tools that are sufficient to allow those with adequate knowledge of the relevant biomedical practices and of the facts of particular cases to determine the morally acceptable alternatives open to them."¹⁴ For Gert, achieving these aims involves providing a short description of common morality, explaining key concepts related to most moral decisions within the medical profession, showing how those concepts are fundamentally related to the common moral system, and providing analyses of cases involving these key concepts using the two-step decision procedure as a *guide*.¹⁵

Gert's Analyses of Four Medical Ethics Cases

I begin my discussion of Gert's analysis of four medical ethics cases with his analysis of the case of Mr. J. Gert states the reason why I analyze this case first. "The following

and Childress have moved on to other theoretical pastures does not change, according to Gert, the continuing influences of their original anthology view.

¹³ Bernard Gert, *Morality Its Nature and Justification*, New York, Oxford University Press, 1998, p 236. Hereafter when referring to this work in this chapter I will use the letters 'MNJ' followed by the relevant page number(s).

¹⁴ BRF, p 11.

¹⁵ BRF, p 11.

case...provides an excellent example of the value of using all of the morally relevant features and the two-step procedure that are essential to moral reasoning.”¹⁶ Before analyzing this case, I restate Gert’s list of moral rules and the two-step procedure so that the reader can get a feel for how Gert frames this case.

The Moral Rules

- | | |
|--------------------------------|---------------------------------|
| 1. Do not kill. | 6. Do not deceive |
| 2. Do not cause pain. | 7. Keep your promises. |
| 3. Do not disable. | 8. Do not cheat |
| 4. Do not deprive of freedom. | 9. Obey the law. |
| 5. Do not deprive of pleasure. | 10. Do your duty. ¹⁷ |

The Two-Step Decision Procedure

Step #1: What are the morally relevant features in this particular case? Answers to the following ten questions that apply to the case at hand are all morally relevant features. These questions help one determine what kind of moral rule violation a particular violation is.

1. What is the moral rule being violated?
2. What harms are being caused, avoided and/or prevented by the violation?
3. What are the relevant desires and beliefs of the person toward whom the rule is being violated?
4. Is the relationship between the person violating the rule and the persons toward whom the rule is being violated such that the former has a duty to violate moral rules with regard to the latter independent of their consent?

¹⁶ BRF, p 242-243.

¹⁷ Bernard Gert, *Common Morality*, a working draft for an upcoming book, Department of Philosophy, Dartmouth College, 2002, p 16. Hereafter, all references to this work will be cited with the letters CM, followed by the relevant page numbers. Although Gert lists these rules in many articles and books, one good question worth raising at this point is why Gert does not include a prohibition against stealing in the list of universal moral rules. For Gert, stealing is not included in the list because it is possible that some societies may not have the institution of private property, making stealing an action that does not apply universally, and is not known and understood (necessarily) by all moral agents at all times, places, and cultures. See MNJ, p 112-113, 198-199. He also argues that in societies where stealing is prohibited, there are normally laws in place to prohibit stealing. Thus stealing would be covered by the moral rule “Obey the law.” Although I do not know whether there are human societies where there is no private property, Gert’s point here seem intuitively implausible. I cannot imagine that there actually is a society where there are no things that are implicitly earmarked for certain people, such as someone’s shoes or a set or prescription sunglasses. There is also another way to look at stealing that I think makes Gert’s view problematic. Suppose a society lives in a commune and agrees to have all their goods in common. Would it not be possible to steal public property too, such as sneaking food from public stores that are above and beyond one’s allocated rations? I think so. Thus, it seems to me that stealing would apply in every society in some form or another. Even without the support of law, it is arguable that stealing ought to be considered a universal moral law.

5. What goods (including kind, degree, probability, duration, and distribution) are being promoted by the violation?
6. Is the rule being violated toward a person in order to prevent her from violating a moral rule when the violation would be unjustifiable or weakly justifiable?
7. Is the rule being violated toward a person because he has violated a moral rule unjustifiably or with a weak justification?
8. Are there any alternative action or policies that would be preferable?
9. Is the violation being done intentionally or only knowingly?
10. Is the situation an emergency such that no person is likely to plan to be in that kind of situation?¹⁸

Step #2: Estimate the consequences of everyone knowing that this kind of violation is publicly allowed and not allowed. This step can be phrased in the form of a question, "What effects would this kind of violation being publicly allowed or not publicly not allowed have?"

The Case of Mr. J

Mr. J was a 50-year-old patient in a rehabilitation ward who was recovering from the effects of a stroke. A major part of his treatment consisted of daily visits to the physical therapy unit, where he was given repetitive exercises to increase the strength and mobility of his partially paralyzed left arm and leg. He was initially cooperative with Ms. Y, the physical therapist, but soon became bored with the monotony of the daily sessions and frustrated by his very slow progress in regaining his ability to move his partially paralyzed limbs adequately. He told Ms. Y that he did not wish to attend the remaining three weeks of daily sessions. Ms. Y knew that patients like Mr. J rarely regress, that is, become worse than they presently are, if they stop exercising. But her experience showed that if patients like Mr. J stopped the sessions early, they did not receive the full therapeutic benefit possible and might suffer for the remainder of their lives from a significantly more disabled arm and leg than would be the case if they exercised now in this critical, early post-stroke period. Accordingly, she first tried to persuade him to continue exercising. When that was not effective, she became rather stern and scolded and chastised him for two days. He then relented and began exercising again, but it was necessary for Ms. Y to chastise him sternly almost daily to obtain his continued participation over the ensuing three weeks.¹⁹

Gert uses his description of the common moral system to assess the justifiability of the physical therapist's actions in the following way. By chastising and scolding Mr. J, the physical therapist is causing him three weeks of mentally and physically painful exercising, which violates

¹⁸ MNJ, p 227-236; CM, p 48-60; Bernard Gert, "Moral Theory and Professional Ethics," op. cit., p 17-18. In this last source question ten about emergencies is omitted and question three is broken out into two separate questions. Question nine adds the words 'voluntarily,' 'freely,' and 'negligently' to 'intentionally' and 'knowingly.'

¹⁹ BRF, p 243.

a *universal moral rule* "Do not cause pain," in order to fulfill the moral ideals "Prevent pain" and "Prevent disability." The physical therapist has a *professional duty* to fulfill these moral ideals. The duties of physical therapists frequently involve causing some, even intense, short-term pain to *prevent long term disability and other harms*.²⁰

To Gert, Mr. J's *ranking of the harms and benefits* is exhibited in his refusal to exercise. Since he does not appreciate the gravity of the consequences at stake, and since he is by his refusal choosing a course of action that will most likely cause him significant, avoidable, and permanent harm without an adequate compensating benefit (avoiding three weeks of repetitive physical therapy is not an adequate compensating benefit), his actions are *irrational*. Since Mr. J is acting irrationally in this situation, he is incompetent to decide for himself whether or not to continue his therapy regimen. Since Mr. J is incompetent to make this particular decision in this particular case, the physical therapist decides that it is justifiable to chastise and scold him without his informed consent.

Gert also notes that it is possible that *Mr. J does not believe* the facts about his long-term prognosis. It is obvious that he does not appreciate the gravity of his situation. Considering the consequences of his irrational *desire* to not continue the three-week therapy regimen, Mr. J is incompetent in spite of the possibility that he has contrary beliefs on this matter.

Gert thinks it is helpful to consider if there are any other reasonable *alternatives* that also might at least be weakly justifiable and would motivate Mr. J to complete his therapy without experiencing the mental pain associated with chastising and scolding him. Gert asks that we consider the following alternative. Once a person has had a stroke, the physical damage is complete, in contrast to heart attacks, where damage is ongoing as heart tissue dies, making ongoing emergency intervention crucial. Instead of chastising and scolding Mr. J to continue his therapy, suppose the physical therapist acted as follows. Mr. J presumably does not know that the

²⁰ BRF, p 243; MNJ, p 209, 247.

physical damage from strokes is complete shortly after the initial attack. Suppose the physical therapist told Mr. J that if he failed to continue the therapy protocol his use of the affected limbs might deteriorate further and he might even lose the ability to walk altogether. Then, when his condition did not deteriorate further, she could tell Mr. J that his therapy was obviously succeeding, since he was at least not getting worse. This alternative would avoid the negative consequences caused by chastising and scolding Mr. J while preventing the same harms long-term. Unlike chastising and scolding, this alternative would violate the moral rule "Do not deceive" rather than the rule "Do not cause pain." Mr. J would benefit from being more internally motivated to continue the therapy and would benefit from a belief that the therapy was producing positive results, though under false pretenses. To Gert, the better balance of consequences of using this treatment option would seem to make deceiving Mr. J a morally preferable alternative to chastising and scolding him.

However, to Gert, applying the two-step procedure to this case shows that using consequences alone to assess the deception alternative is problematic. If the consequences make deceiving Mr. J justifiable, then the deception alternative is more *strongly justifiable* than the chastising and scolding alternative. For Gert, this result is clearly counterintuitive because most moral agents would prefer to be chastised and scolded rather than deceived in relevantly similar contexts.²¹ Fully informed moral agents would *publicly allow* the practice of chastising and scolding in this case and similar cases that share the same morally relevant facts, but they would not publicly allow the practice of deception in cases like these even though the balance of consequences is apparently more favorable.

Gert provides the following two intertwining reasons why moral agents would not *publicly allow* deception in the case of Mr. J and similar cases. The first reason concerns the

²¹ An implication that Gert does not mention is the following. If only negative consequences matter in this case, then the physical therapist presumably made a moral error by chastising and scolding Mr. J rather than deceiving him. Most moral agents would not reach this conclusion.

issue of trust in a profession where trust is vital. If moral agents knew that health care providers could deceive them when they determined that deception was in a patient's best interest, the consequences to the integrity of the medical profession would probably be very harmful. To Gert, moral agents implicitly recognize this fact. Patients would wax cynical and be less inclined to seek medical care.

This trust issue is related to Gert's second reason for rejecting deception as a morally acceptable alternative. If deception were the only reasonable alternative in this and similar cases, then if the negative consequences were minimal and the deception prevented a significant amount of at least moderate and permanent life-long disability, then deception could seem *prima facie* justifiable. Moral agents would be more divided on whether deception in the absence of any other reasonable alternatives should be publicly allowed. However, considering that there is a reasonable alternative (chastising and scolding) that presumably produces the same long-term results, Gert concludes that the deception alternative is, "completely morally unacceptable."²² Chastising and scolding produces the relevantly similar long-term results, preserves the integrity of the profession in the eyes of the public, reduces temptations to deceive in unjustifiable cases, and is an alternative that a much higher percentage of moral agents would publicly allow.²³

For Gert, step two of the two-step procedure more accurately captures the intuitions that moral agents have about what actions are morally acceptable in this and similar cases. Making consequences the lone morally relevant feature does not account for these intuitions. For Gert, if other alternatives such as chastising and scolding were available, no rational moral agent would

²² BRF, p 245.

²³ BRF, p 244-245.

publicly allow physical therapists to deceive patients in cases like these when they felt the balance of consequences warranted it.²⁴

Gert concludes that, *the probable consequences* of not completing the therapy regimen make the physical therapist's chastising and scolding at least *weakly justifiable* in this and similar cases. Gert states, "A rational person could advocate *publicly allowing* this kind of violation, and we conclude that Ms. Y's [the physical therapist's] behavior was at least weakly justified."²⁵

Core Medical Ethics Concepts

Earlier I stated that my reason for discussing Gert's analysis of the case of Mr. J first was to illustrate a case where Gert more explicitly follows his two-step decision procedure. However, there is another important reason for beginning with this case. Notice that even though Gert follows the two-step procedure rather explicitly in his analysis of this case, other concepts are introduced that do not appear in his moral theory but which, Gert argues, are concepts crucial to making controversial medical ethics decisions. These concepts are competence, informed consent, confidentiality, and paternalism. For Gert, these concepts are both logically related to each other and logically grounded in the common moral system that he argues all moral agents implicitly use when they make moral decisions and judgments. When health care professionals assess a patient as incompetent, fail to obtain informed consent, fail to respect patient confidentiality, and treat patients paternalistically, universal moral rules are always violated.²⁶ These four concepts are instrumental for assessing the justifiability of proposed violations of moral rules that occur in medical contexts.

²⁴ Gert is not specific here. However, if the physical therapist used whips to motivate Mr. J, then that would cause the sort of intense pain that would make paternalistic physical therapy of this sort unjustifiable, to Gert.

²⁵ BRF, p 243.

²⁶ BRF, p 12. Interpreting existing laws also poses moral problems for medical professionals, but since obeying the law is a universal moral rule, breaking the law qualifies as civil disobedience, a morally relevant fact of some medical moral decisions that violate other moral rules.

For Gert, competence, informed consent, confidentiality, and paternalism are not stand-alone concepts. Although Gert does not explicitly say so, his definitions of these concepts build upon each other in a logical way. Gert's definition of competence in medical ethics is grounded in his view of irrational and rational action. Gert's definition of informed consent is logically grounded in his definition of competence. His definition of confidentiality is grounded in his definition of informed consent. Finally, Gert's definition of paternalism is grounded in his definition of competence and informed consent, and is implicitly grounded in his definition of confidentiality. Paternalism is the thickest concept of the four.

Before I discuss Gert's analysis of the remaining three cases, it is important to explain Gert's account of these four concepts and show how they are logically related to each other and to the common moral system. Judging a patient to be incompetent, failing to obtain informed consent, violating patient confidentiality, and treating patients paternalistically are actions that violate universal moral rules; these actions deceive, cause pain, take away freedom and pleasure, and override fundamental professional duties in order to prevent worse harms.

Competence

Gert defines competence as "the ability to make a rational decision" in a particular situation.²⁷ Recall that, for Gert, irrationality is normatively primitive to rationality. For Gert,

An action is irrational in the basic sense if and only if it is an intentional action of a person with sufficient knowledge and intelligence to be fully informed about that action, and who, if fully informed, (1) would believe that the action involves significantly increased risk of suffering death, nontrivial pain, loss of ability, loss of freedom, or loss of pleasure [for oneself and those one cares about] and (2) would not have an adequate reason for the action.²⁸

Irrational actions cause harm to the self and/or loved ones without providing an adequate compensating benefit. In medical treatment situations, Gert argues that patients are incompetent if they make treatment decisions that cause themselves or their loved ones harm for no adequate

²⁷ BRF, p 138-139.

²⁸ MNJ, p 84.

compensating benefit (inadequate reasons). For example, if a patient has an early stage but potentially dangerous melanoma and refuses to have the cancer extirpated, that patient demonstrates that she is incapable of making a rational decision in this particular situation. Refusing treatment involves a high risk of causing significant harm without an adequate compensating benefit.²⁹ Considering the morally relevant facts of this situation, no impartial and fully informed rational moral agent would choose not to have this melanoma treated or advise those they care about to do the same.

For Gert, incompetent medical treatment decisions are based in four patient deficiencies. Patients may *fail to understand the relevant information* about their diagnosis. Patients may understand the relevant information about their diagnosis but *not fully appreciate the importance of the information*. Patients may be incompetent because they have an *inability to coordinate relevant information*, such as grasping the connection between their melanoma and their imminent death if untreated. Finally patients may be incompetent because they *have a mental malady* such as a mood or volitional disorder. Any one of these deficiencies may be sufficient to make a patient incompetent, incapable of making a rational decision regarding a specific treatment decision.³⁰ Incompetent patients cause themselves harm without adequate compensating benefit.

To Gert, it is important to realize that incompetent patients are not incompetent *per se*, but incompetent to make particular treatment decisions. If a patient is incompetent to make a particular treatment decision, then another moral agent who is competent to make that particular treatment decision will normally make it, perhaps family, friends, or legally authorized guardians. Some rational moral agent should be tasked with making the appropriate decision for the person who is irrational regarding a particular decision.

²⁹ MNJ, p 39; CM, p 83.

³⁰ BRF, p 139.

Informed consent

The second medical ethics concept Gert argues is logically grounded in his description of the common moral system is the concept of informed consent. For Gert, physicians have a professional duty to obtain informed consent before proceeding with medical treatments. Failing to obtain informed consent always violates universal moral rules. Thus, all decisions to *not* obtain informed consent from patients must be justifiable.

Sometimes informed consent occurs almost automatically. An example of such a case would be when physicians prescribe antibiotics for localized but potentially dangerous infections. Most patients know that these sorts of treatments are routine and can prevent great potential harms at minimal cost. Accepting these treatments demonstrates patient competence.

Since the concept of informed consent has a systemic influence on so many controversial issues associated with medical treatment, it is useful for the reader to understand Gert's *comprehensive* account of the concept. Many medical situations occur where it is not clear whether or not consent is informed. In other cases, treatment regimens are complex and ongoing, and it is unclear just how often, if ever, consent needs to be explicitly reacquired. For Gert, the key issue involving decisions involving informed consent is whether or not the consent was *valid*.

For Gert, there are three necessary conditions for a *valid* informed consent. (1) Physicians must give their patients *relevant information* about proposed treatments. (2) They must *not coerce* consent from their patients. And (3), they must *assess patients' competence*. Only competent patients can give informed consent since only they have the ability to make rational decisions involving their treatment options.³¹

These necessary conditions are logically grounded in a moral agent's obligation to obey the universal moral rules. For Gert, not providing patients with relevant information on treatment options violates the moral rule "Do not deceive;" it manipulates patients by hiding relevant

³¹ BRF, p 151-152.

information in order to steer a patient towards a course of action the physician has unilaterally determined is appropriate. Patients must be adequately informed or their treatment decisions are invalid.

Coercing patients into consenting violates (at a minimum) the universal moral rule "Do not deprive of freedom." Coercing patients down treatment paths also usually causes other harms such as mental suffering in the form of anger and resentment. Coercing consent from patients is analogous to coercing confessions out of suspected criminals. A coerced confession is not a valid confession. On the other hand, sometimes patients may be coerced if they are incompetent to make their treatment decisions and their irrational decisions involve significant but avoidable harms. These decisions have to be handled on a case-by-case basis.

Gert's analysis of informed consent is intuitively plausible. If a physician wants to treat a patient by lancing a boil, then, assuming the patient is competent to make his own treatment decisions, it is obvious that the physician should advise the patient on the appropriate treatment and obtain his permission before lancing it. If the physician lanced the boil without permission, she would commit at least three unjustifiable violations of moral rules. She would be deceptive, cause pain, and take away the moral agent's freedom without adequate justification.

Of Gert's three criteria for informed consent, the requirement to give patients relevant information is the most complex of the three. This issue is complex on many levels. First, communicating relevant information to patients should include a discussion of treatment options. In many medical situations, only one treatment option is available. If a patient is diagnosed with appendicitis, normally the only rational option available to patients is to have immediate surgery to stop severe pain and to prevent potentially lethal peritonitis. An ignorant but competent moral agent only needs to be informed of the diagnosis and the probable consequences of peritonitis in order to give immediate valid consent for the appendectomy. Refusing to have surgery for acute

appendicitis is usually irrational behavior and would be conclusive evidence that a patient is incompetent.³²

In many situations several treatment alternatives are available that are rationally allowable. For Gert, a valid consent requires that physicians communicate these options to their patients. If a patient is diagnosed with an early stage breast cancer, two treatment options might be to have a mastectomy or merely to have a localized lumpectomy followed by radiological treatment. To not communicate these alternatives would invalidate a subsequent consent and violate the moral rules against causing deception, pain, and disability without adequate justification.³³

In conjunction with communicating treatment options, the physician should provide patients with information about treatment success rates. A patient predisposed to choose the lumpectomy without all the facts may change her mind if, e.g., she is told that the lumpectomy increases the likelihood of metastasis by 20 percent. If the patient's physician prefers a specific treatment for the breast cancer, but some of her colleagues disagree with her about the best treatment option, then the physician should also communicate this information to the patient. Finally, the physician should inform the patient of the likely results of choosing no treatment. While untreated breast cancer has an almost certain lethal outcome, outcomes are not as clear with avoiding treatment for other maladies such as high blood pressure. Patients should be told if choosing to control high blood pressure by diet alone rather than by prescription medication is a reasonable option in that patient's particular circumstances.³⁴

To Gert, communicating relevant information about treatment alternatives should also be presented and discussed with a proper attitude. If a patient's physician prefers one treatment

³² BRF, p 154.

³³ BRF, p 155.

³⁴ BRF, p 155, 163.

alternative over another, it is wrong for the physician to discuss the preferred alternative by exaggerating the positive aspects of that treatment while discussing less preferred alternatives in a negative or sarcastic way.³⁵ The choice is the patient's to make. For Gert, communicating alternatives properly does not preclude the physician from justifiably taking a stand on a treatment option. If the physician thinks that a mastectomy is the best course of treatment and will most likely prevent the patient's long-term harm, then the physician should be candid and say so.

To Gert, the relationship between discussing treatment options and valid consent also holds for the practice of recommending diagnostic medical tests. Patients who give valid consent for diagnostic tests should be instructed on the harms and benefits at stake in taking or refusing those tests. Patients should also be told why the tests are important, and what the success rates of the tests in question are. If there is 10 percent likelihood that a test will give false results, then patients ought to know this information; this information could be the morally relevant fact that influences a patient to consent or not consent to the test. The test might falsely reveal that the patient has a malady she does not have, or fail to reveal a malady she does have.³⁶

The relationship between the need to communicate relevant information and valid informed consent becomes complicated when situations arise where a physician feels a need to change the treatment process.³⁷ Suppose a surgeon has a patient's valid consent to perform laproscopic gall bladder surgery. Once the surgeon begins the surgery, she discovers gallstones that are too large to remove without making a larger incision. In this case, if the physician did not discuss this possibility with the patient prior to surgery, is the surgeon morally justified in proceeding with the more invasive surgery? The balance of harms and benefits has changed. The

³⁵ BRF, p 156.

³⁶ BRF, p 156.

³⁷ BRF, p 158.

scar will be more pronounced, the recovery process more difficult, and the patient might miss more work. If the surgeon is aware these possibilities before surgery commences, then she should tell the patient of this possibility before surgery and obtain consent to proceed with the alternative extirpation should the need arise. If the physician was unaware of the possibility that more invasive surgery might be necessary, the appropriate decision depends on the details of that particular case. For example, if the patient is in imminent danger from a perforated gall bladder and peritonitis is possible, then performing the more invasive surgery without a fresh valid consent may be morally justifiable in that case.

Treatment situations where prudent adjustments are made are not limited to surgeries only. Many treatment regimens cover a long period of time and require periodic adjustments. Does each of these adjustments require that a fresh valid consent be obtained? Suppose a patient has been hospitalized for clinical depression and the psychiatrist has prescribed antidepressant medication. Generally, if patients voluntarily admit themselves to a hospital for clinical depression, valid consent is provided for what is presumably a standard treatment regimen over many days or weeks. The communications between physicians and patients are ongoing and periodic adjustments to medications are made. However, assuming that the patient is competent, does the physician require a fresh valid consent to increase or reduce the dosage of antidepressant medication by ten percent? This situation is one in which moral agents might disagree depending on the morally relevant facts of that particular case. Suppose instead that the psychiatrist thinks that the irritating side effects of one medication can be avoided and greater therapeutic benefit gained by switching to another antidepressant medication. In this case, the change is significant enough that the psychiatrist should inform the patient and obtain a fresh valid consent for the change. There are many other morally relevant facts that influence this judgment. The patient may need to be informed about different side effects, higher costs, and/or the probability that the

new medicine will or will not work.³⁸ While valid consent may be obtained for some standard but long term complex treatment regimens in what amounts to a packaged deal, situations may arise where physicians should reinitiate the consent process. In the absence of specific policy, these decisions must be handled on a case-by-case basis. For Gert, the justifiability of these decisions depends on the results obtained from gathering morally relevant facts and estimating the consequences of publicly allowing physicians to make relevantly similar changes in treatment regimens without obtaining fresh valid consent.

Another important issue Gert raises regarding the relationship between obtaining valid consent and communicating relevant information concerns the method of communicating that information. This is particularly important since patient decisions are seriously influenced by how treatment alternatives are framed. Suppose a physician tells a patient that a treatment alternative that causes moderate pain can prevent future recurrence of cancer by forty percent. Any moral agent hearing this information without further reflection would be inclined to proceed with that treatment. However, what if this treatment actually reduces the incidents of recurrence from 70/1000 to 42/1000? Framed in this way the patient's initial reaction to the treatment is not going to be as positive, considering the moderate pain or other potential harms at stake. Accurately framing the risks of treatments provides a better picture to the patient of the overall risks and rewards of consenting to or refusing the recommended treatment.³⁹

I mention one last issue that Gert raises involving physician-patient communications about treatment alternatives, the issue of varying success rates at different institutions. According to Gordon, Burleyson, Tielsch, and Cameron, "The relationship between volume of surgical

³⁸ I use the example of depression, but Gert provides two additional examples. See BRF, p 159. One is a patient in an alcohol detoxification program who is prescribed Librium to quell the delirium tremens. The Librium doses have to be adjusted in response to periodic changes in a patient's nervous excitability. Another example he gives is a patient hospitalized for a heart attack. For Gert, the patient's consent to treatment for a heart attack does not need to be consulted for every minor adjustment in oxygen, anticlotting medication, or rhythm stabilization medications.

³⁹ BRF, p 163.

services performed by surgeons and hospitals, and positive outcomes of care, has been well documented.”⁴⁰ For example, consider what is commonly called the Whipple procedure, in technical terms a ‘pancreatico-duodenectomy.’ From 1988 to 1993, 501 Whipple procedures were performed in Maryland. Over half of the Whipple procedures were performed at Johns Hopkins Hospital, while the remainders were performed at 38 other hospitals in Maryland. According to Gordon, Burleyson, Tielsch, and Cameron, the mortality rate for this procedure at Johns Hopkins Hospital was 2.2% of the 271 performed. Of the remaining 240 Whipple procedures performed at other hospitals in Maryland, the mortality rate was 13.5%.⁴¹ The point of stating these statistics is to show that differing success rates at different hospitals that perform the same procedure are crucial morally relevant facts that patients have a right to know before their consent can be considered valid. If physicians perform a procedure at a hospital where the success rate is low and physicians are, or should be aware of these differing success rates, then those physicians have a duty to communicate this with their patients. A person facing a Whipple procedure would obviously want to know this information. It would, *ceteris paribus*, be irrational for informed patients living in Maryland and the surrounding area not to vigorously seek to have her Whipple procedure performed at Johns Hopkins Hospital. It would be negligent for a physician who knows the statistics not to inform patients of these facts.

Gert spends many more pages discussing the criterion of providing relevant treatment information⁴² than he does the criterion of coercion.⁴³ There are so many factors associated with communicating information to patients and so many subtle ways to abuse the communication process that it is understandable why Gert does spends so much time discussing the issue. Scores

⁴⁰ Toby A. Gordon, Gregg P. Burleyson, James M. Tielsch, and John L. Cameron, “The Effects of Regionalization of Cost and Outcome for One General High-Risk Surgical Procedure,” *Annals of Surgery*, vol. 221, 1995, p 43.

⁴¹ Ibid, p 43-49.

⁴² BRF, p 152-174.

⁴³ BRF, p 174-175.

of cases could be analyzed that concern this criterion. How much and what type of information should doctors communicate in order for subsequent consents to be considered valid? Given the practical limits of time in doctor-patient settings and the epistemic limitations of physicians, it seems likely, that patients are too often not provided with *adequate* information prior to giving consent. To Gert's credit he recognizes these liabilities and provides these many useful pointers so that doctors can improve the quality of the consents they obtain.

For Gert, the *moral ideals* are also relevant to the patient consent process. Medical professionals should be encouraged to do more than simply satisfy the three criteria for valid consent. Communities where physicians exceed the minimum standards are communities where even less harms such as death, pain, disability, loss of freedom, and loss of pleasure are caused by inadequacies in the consent process.⁴⁴ While physicians cannot be expected to fulfill moral ideals all of the time in the same way they are morally required to obey the universal moral rules all of the time, preventing harm is a duty of medical professionals in virtue of physicians' social roles. Actions that fulfill moral ideals but are not required by professional duty are actions that exceed professional standards of behavior. The distinction between moral ideals that are required by professional duty and moral ideals that are not required (but nevertheless ought to be encouraged) applies to the requirement to obtain informed consent before administering medical treatments. For Gert, *valid* consent is a professional duty; *ideal* consent is not.⁴⁵

For Gert, obtaining *ideal* consent involves taking extra measures to prevent patients from making irrational decisions. To Gert, the distinction between valid and ideal consent is important because it is possible for patients to make irrational treatment decisions even when the criteria of valid consent have been satisfied.⁴⁶ In response to a physician's diagnosis and communication of

⁴⁴ See my discussion of moral ideals in the section "Moral Ideals" in chapter 3.

⁴⁵ BRF, p 175.

⁴⁶ BRF, p 176.

relevant treatment information to a patient, that patient may make a treatment decision that is inconsistent with his overall personal ranking of harms and benefits. For example, a physician may tell a middle-aged but sexually active man that he has entered into the very early stages of prostate cancer. Alarmed at hearing he has cancer, the man decides he wants to have surgery immediately. Having surgery for prostate cancer is normally a rational treatment option, and if the physician performed the surgery on this man, he would be doing so with valid consent. The patient has the relevant information, is not coerced, and choosing the surgery is not evidence of patient incompetence. However, since this is still sexually active, the physician would be pursuing *ideal consent* by taking extra time to calm the patient's unnecessary alarm. Prostate cancers usually grow very slowly, so much so that many men will die of other causes after years, perhaps decades of normal living. According to Gert, this physician would be pursuing an ideal consent situation by taking extra time to discuss the relevant facts about mortality rates from untreated prostate cancers and by counseling this patient on the significant risks of impotence from prostate cancer surgery. Conscientiously communicating these relevant facts might prevent what could be an irrational decision for this sexually active middle-aged man in this case. In several years this man may cease to be sexually active and want to reconsider the surgery in light of his new rankings of harms and benefits.

Pursuing ideal consent also includes explicitly making clear to patients that a particular treatment path is not being forced upon them. Ideal consent also includes mitigating the *appearance* of coercion and includes taking conscious steps to not manipulate patients in any way. Subtle forms of manipulation are not necessarily coercive; however, pursuing ideal consent involves avoiding little manipulations would steer a patient in one direction.⁴⁷

Finally, for Gert, pursuing ideal consent can and should influence how physicians assess patient competence. If a patient makes a snap decision in response to a diagnosis, even if the

⁴⁷ BRF, p 176.

decision is a rational one, the decision may not be made reflectively. A physician pursuing ideal consent may want to encourage a patient to think about the decision a day or two before making a final determination. Also, if a patient chooses a rational alternative that a physician feels strongly is not the best choice in that situation, pursuing ideal consent may entail that the physician attempt to persuade a patient by stressing the importance of relevant facts that the physician perceives the patient to be taking too lightly.

Confidentiality

For Gert, the third concept that influences the doctor/patient relationship and which is logically grounded in the common moral system is the concept of confidentiality. The concept of confidentiality is conceptually related to the concept of privacy. Gert states,

Doctors should make sure that their patients are informed about what kinds of information they do and do not regard as private and under what conditions and to whom they will or will not disclose information. Simply put, a physician's policies about confidentiality should not be kept private from their patients.⁴⁸

Gert also states,

Physicians should warn patients in advance whenever any treatment, regimen, or diagnostic test suggested to the patient carries with it some risk of loss of privacy. The disclosure of private information often carries with it some risk of harm to the patient.⁴⁹

Gert thinks that doctors should communicate their policies about disclosing confidential patient information and should obtain informed consent before violating patient confidentiality. Since disclosures of confidential information risk causing harm to patients, patients should normally be the ones to decide how, when, and to what extent confidential information is released. In order for patients to give valid consent to release confidential information, those patients must be competent or the consent is not valid. Competent patients are capable of making rational treatment decisions in particular situations. Competent patients do not cause or significantly

⁴⁸ BRF, p 188.

⁴⁹ BRF, p 188.

increase the likelihood that they or those they care about will suffer harms without an adequate compensating benefit.

For Gert, the concept of privacy has three components, each of which he includes in the following definition. "An individual or group has privacy in a situation with regard to others if and only if the individual or group is normatively protected *from intrusion, interference, and information access by others*."⁵⁰ In the aforementioned quotes, Gert is clearly discussing the issue of information access by others. Thus it seems that he is using 'privacy' and 'confidentiality' interchangeably.

Protection from *intrusion* is fundamental to privacy rights. In the U.S. the right against intrusion is protected by amendments to the U.S. Constitution. For example, the fourth amendment states articulates that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."⁵¹ Freedom from intrusion may also include freedom from cameras and other invasions, e.g., from the press.⁵²

Protection from *interference* is the component of privacy rights that protects a person's freedom of action in personal matters. Suppose a counselor is discussing contraception alternatives with a patient who also happens to be an orthodox catholic. Suppose also that the counselee also wants this information. In this case, the nation, state or church would be invading the patient's privacy if they tried to legally or forcefully prohibit this private conversation. While the nation, state, or church is not restricted from putting moral pressure on the patient in the form of arguments, doctrines, or conditions for group membership, neither of these entities may legally nor forcefully interfere with the patient's freedom of information of this type. Legal and

⁵⁰ BRF, p 183.

⁵¹ Taken from the U.S. Constitution, online posting <<http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmentiv>>.

⁵² BRF, p 182.

physically forceful pressure is interference. Moral or argumentative pressure is not interference. According to Gert, the noninterference component of privacy was used to defend a woman's right to obtain an abortion in *Roe v. Wade*.⁵³

For Gert, protection from unjustifiable release of personal information is the criteria of privacy that is most relevant to medical confidentiality. The doctor-patient relationship is very personal. Patients frequently must disclose sensitive information about themselves in order to obtain proper medical treatment. If physicians disclosed personal and often embarrassing information about patients to family members or third parties, the relationship of trust and honesty needed for proper medical treatment would be seriously jeopardized and much unnecessary harm would result, which is a violation of moral rules. These violations must be justifiable. Violating patient confidentiality causes harms such as pain, loss of freedom, and loss of pleasure. This relationship between confidentiality and the universal moral rules explains why confidentiality has been a long-honored capstone of medical practice.⁵⁴

For Gert, while violating patient confidentiality normally violates moral rules such as depriving of freedom and pleasure and causing pain, the justifiability of particular violations of patient confidentiality is complex and depends on facts of each particular case. To illustrate, in Latin American countries such as Argentina, telling immediate family members about a patient's condition is not considered a violation of confidentiality, whereas in the U.S. it is considered a violation.⁵⁵ If identical cases are considered with the exception that one case occurs in Argentina

⁵³ *Roe v Wade*, 410 US 113 (1973).

⁵⁴ For example, the American Medical Associations Code of Medical Ethics defines the following principle in its *Principles of Medical Ethics*, June 2001, "A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law." See the following for the definitions of each of the core medical ethics principles. Online posting at <<http://www.ama-assn.org/ama/pub/category/2512.html>>. Additionally, the Hippocratic Oath includes the following charge, "Whatever I see or hear, professionally or privately, which ought not to be divulged, I will keep secret and tell no one." See *Hippocratic Writings*, translated by J. Chadwick and W. N. Mann, New York: Penguin Books, 1950.

⁵⁵ BRF, p 184.

and the other in the U.S., then for Gert this difference may be decisive in determining whether the violation of confidentiality in question is strongly justifiable (in Argentina) but weakly justifiable or unjustifiable (in the United States).

Gert acknowledges that the issue of patient confidentiality is complicated by the fact that many routine violations of patient confidentiality are necessary in order to have an efficiently functioning medical profession. Physicians routinely disclose some confidential information about patients without explicit consent. Blood and urine samples are sent to labs staffed by technicians. Medical secretaries know the prescriptions their physicians prescribe for various patients and they can easily infer what conditions these patients have.

For Gert, while many of these routine violations of confidentiality are necessary, ambiguities in the practice of disclosing private patient information in light of the evolution of medical practices makes it crucial to continuously scrutinize these disclosure practices. Balancing information dissemination with confidentiality rights should come under continuous scrutiny in this age of information technology and the explosion of medical specializations. More and more health care providers are privy to more and more confidential patient information than ever before.

To Gert, and presumably to most moral agents, even routinely accepted disclosures of patient information may violate moral rules, such as causing pain, but are acceptable practices that most moral agents would publicly allow. Gert defends these routine practices by explaining that institutional "need to know" barriers are in place in order to prevent large numbers of auxiliary and primary health care providers from having unrestricted access to patients' private treatment information. For example, in the psychiatric example I briefly mentioned, the family practitioner knows that a patient needs psychiatric treatment but presumably does not know intimate details of the patient's malady that the psychiatrist will come to know. As long as access

to private information is restricted to the minimum necessary to treat the patient properly, then information sharing is properly balanced with patient confidentiality.⁵⁶

Paternalism

The final medical ethics concept that Gert addresses which is logically grounded in his description of the common moral system is the concept of paternalism. For Gert, paternalistic action is defined as follows. P is acting paternalistically toward S if and only if (1) P intends his action to benefit S, (2) P recognizes (or should recognize) that his action toward S is a kind of action that needs moral justification, (3) P does not believe that his action has S's past, present, or immediately forthcoming *consent*, and (4) P regards S as believing he can make his own decision (is *competent*) on this matter.⁵⁷ For Gert, since paternalistic actions are, by definition, performed without informed consent, they always violate at least the same moral rules that are violated when valid consent is not obtained. Paternalistic actions always deny moral agents of freedom, and many result in taking away pleasure, causing pain, deception, and even disability and death.

Paternalism is a thick concept that has embedded within it the other medical ethics concepts of competence, informed consent, and patient confidentiality, which are logically grounded in the common moral system. Thus, paternalism is a concept that is grounded in the common moral system. Paternalistic actions are done without valid consent. Failure to obtain valid consent requires a negative assessment of patient competence. Incompetent patients are incapable of making a rational decision regarding their treatment decisions in a particular situation. Patients who make irrational treatment decisions cause or significantly increase the probability that they or someone they care about will suffer one or more of the harms of death, pain, disability, loss of freedom, and loss of pleasure without an adequate compensating benefit (without adequate reason).

⁵⁶ BRF, p 186.

⁵⁷ BRF, p 196.

Although I did not use the word 'paternalism' explicitly in my discussion of Gert's analysis of the case of Mr. J, that case is a case about medical paternalism. The case satisfies Gert's definition of the concept. The physical therapist treats Mr. J for his own long-term benefit. The physical therapist does not have Mr. J's informed consent, and she regards Mr. J as believing that he is competent to make his own treatment decisions regarding physician therapy. Mr. J understands his condition and, at least implicitly, and is aware of the risks of refusing to complete the treatment regimen. From the text of the case it is clear that the physical therapist is thinking about the reasons that make her paternalistic chastising and scolding actions morally justifiable. The physical therapist decides that Mr. J is incompetent because refusing to continue therapy in this situation is irrational. Given the morally relevant facts of this case, his refusal is a decision that significantly increases his risk of permanent harm including pain and disability without an adequate compensating benefit, i.e., not having to put up with the tedium of three weeks of redundant and demoralizing therapy.

Although Gert does not state so explicitly in his definition of paternalism, the issue of confidentiality is implicit in moral decisions involving paternalism. When paternalistic treatment of patients is considered, confidentiality is often violated, since many times other family members or legal guardians have to become privy to the patient's private medical information in order to make treatment decisions on behalf of the patient.

My plan for discussing Gert's analyses of the next three cases is to follow the logical progression Gert implicitly establishes from informed consent through confidentiality to paternalism. The following case, the case of Mrs. R, is a controversial case about the moral requirement to obtain informed (valid) consent. In each of these last three cases, Gert's analyses clearly do not follow his two-step moral decision procedure in cookie cutter fashion. However, he does follow the procedure implicitly. While Gert does not sequentially run through answers to each question he proposes to *guide* the isolation of morally relevant facts in a particular case, he does usually apply step two explicitly, i.e., make a determination about what fully informed

impartial moral agents would publicly allow in the case under review and all cases that share the same morally relevant facts.

For Gert, while valid consent requires physicians not to coerce treatment decisions out of patients, sometimes cases arise where coercion may originate in other sources. Family members or friends can put enormous psychological pressure on patients to submit to certain treatments they would not unilaterally choose to take.

The Case of Mrs. R

Mrs. R is a 61 year old, legally blind and chronically physically ill woman who is admitted to an inpatient psychiatry unit for treatment of a severe depression which had been poorly responsive to antidepressant medications. She has had three other episodes of depression during the past 10 years, each of which has similarly been poorly responsive to medication but in each case has subsequently resolved quickly with electroconvulsive therapy (ECT).

On admission to the unit, Mrs. R is reluctantly agreeable to receiving ECT. However, two days after admission she tells her psychiatrist, Dr. B, that she is actually very frightened of having ECT and is consenting only because of threats from her husband. Her husband had threatened her at the time of admission by telling her that he would not help to care for her at home if she returned without having had ECT.... Numerous attempts by various health care professionals to contact Mr. R over the next week prove unsuccessful, but Mr. R tells his wife by telephone that he refuses to come to the hospital until she has ECT. Mrs. R asks the staff to stop trying to reach her husband. She says that she is willing to give permission for the ECT, and sign the consent form, though she continues to insist to the staff that if it were up to her alone, she would not consent.⁵⁸

For Gert, the moral issue at stake in this case is *whether Mrs. R's consent is valid* given that Mr. R is psychologically coercing her to consent to ECT. Recall that, for Gert, the second requirement for valid consent is that the patient not be coerced into consenting. Given that Mrs. R is blind and has chronic health problems, Mr. R presumably is burdened by caring for her, and this burden is exacerbated during periods when she is depressed. Mrs. R believes that she cannot make it without her husband's help and she would prefer that he be the one to provide her with the help that she needs. What are the morally relevant facts of this case?

⁵⁸BRF, p 174.

Gert acknowledges that the health care professionals in this situation are understandably in a quandary. One *alternative* Gert briefly considers for the health care providers is to put Mrs. R into a nursing home. However, Gert assumes that she is poor and would end up in a state home that he also, for purposes of framing the case, assumes provides care that is substandard to the care her husband provides. Gert also assumes that Mrs. R knows these facts about state nursing home care and subsequently rejects this alternative. Mrs. R has no one else that she can live with.

Gert argues that Mr. R's coercion of his wife is a *fact-of-life* that Mrs. R must cope with. In this respect Mr. R's psychological coercion is like unavoidable disease symptoms. Mr. R's coercion is also a fact-of-life that the physicians must contend with and over which they have little control.

Gert uses an analogy to clarify this seemingly problematic comparison. For Gert, the husband's coercion is analogous to the pain suffered by a person with acute appendicitis. Both the coercion of the husband and the pain and untreated consequences of acute appendicitis provide strong stimulus to give consent for certain treatments. The husband's coercion and the appendicitis are facts that are beyond the control of morally responsible health care professionals, but they both lead, Gert argues, to valid consents.⁵⁹

The medical staff agrees with Mr. R that Mrs. R's best treatment option is to have ECT. It would be paradoxical for the medical staff not to provide Mrs. R with what they consider to be the best treatment for her condition because they view Mr. R's psychological pressure as invalidating her consent.

Gert does not explicitly follow either step of his two-step decision procedure in assessing the case of Mrs. R. Rather, Gert explicitly focuses on the issue of whether Mrs. R's consent is valid. For Gert, Mrs. R's consent is valid. *Mrs. R has adequate information, she is competent to make her treatment decisions, and the coercion she experiences from her husband is regrettable*

⁵⁹ BRF, p 174-175.

but unavoidable. However, Gert does apply his two-step decision procedure implicitly in this case. He discusses what he considers to be the morally relevant facts of the case. Coercion causes Mrs. R fear and anxiety, which are violations of moral rules that must be justifiable. Treating Mrs. R prevents other serious harms, some of which would be caused by Mr. R if she does not consent to have ECT. The medical staff obviously has a duty to treat Mrs. R pending her valid consent. Mrs. R's beliefs about ECT are discussed, as is her strong desire to have her husband care for her. Gert also broaches one possible alternative (moving into a state run nursing facility). It is also clear that this situation is not an emergency such that Mrs. R is in imminent danger if she does not receive treatment immediately. The medical staff recognition of this fact is evidenced by their repeated attempts to contact Mr. R.

Gert's implicit application of step two is less clear in this case. Since Gert thinks Mr. R's coercion of his wife is a fact-of-life analogous to acute appendicitis, Gert implies that treating Mrs. R with ECT would be morally justifiable according to step two of his decision procedure. Performing surgery on a person with acute appendicitis after obtaining valid consent is nearly always strongly justifiable, i.e., all fully informed moral agents would want an appendectomy and strongly advise those they care about to do the same. Performing appendectomies on persons with acute appendicitis is a practice that all rational moral agents accept and want the health care system to provide. Since Gert holds that the case of Mrs. R is analogous to appendicitis, he thinks fully informed impartial moral agents would also publicly allow treating Mrs. R with ECT, in spite of her husband's coercion.⁶⁰

For Gert, since Mrs. R has not granted permission to the medical staff to put additional pressure on Mr. R to change his coercive behavior, the medical staff has no special burden to

⁶⁰ This analogy's weakness lies in the fact that the practice of performing appendectomies on persons with acute appendicitis seems to be more strongly justifiable than treating Mrs. R with ECT. Treating Mrs. R with ECT in this case is, I think, weakly justifiable. Some moral agents would not publicly accept the practice treating Mrs. R and all other patients in relevantly similar circumstances, i.e., patients who are being coerced into treatment by family members to have treatments they would not otherwise consent to.

pressure Mr. R on her behalf. Gert does make it clear that he thinks that the medical staff is correct to judge that Mr. R's coercive behavior of Mrs. R is morally unjustifiable. The medical staff's efforts to contact Mr. R to confront him about his coercive behavior are laudable but not morally required. These extra efforts on behalf of Mrs. R are in the pursuit of *ideal* consent.

The concept of informed consent implicitly influences all medical decisions that involve patient care. Valid consent is required before confidential information about a patient can be released. Valid consent is required before withdrawing life-prolonging treatment from terminally ill patients. Valid consent is required for any moral agent who is competent to make his or her own decisions. Even for patients who are presently incompetent, advanced directives may satisfy the criteria for valid consent.

In this next case, I discuss Gert's analysis of a case that involves the issue of assessing when violations of patient confidentiality are morally justifiable. Remember that, for Gert, the concept of confidentiality is logically grounded in the common moral system in the following way. Unless an exception is justifiable using the two-step procedure, violating patient confidentiality requires valid consent. Persons who give valid consent are informed, not coerced, and competent (not irrational) to make their own medical treatment decisions. Failure to satisfy the criteria of valid consent and competence violates moral rules and exceptions have to be justifiable.

The Case of the Bisexual Husband

A male patient, unbeknownst to his acquaintances, has homosexual relationships. Even his wife does not know he has frequently picked up male lovers when he has been out of town on business trips. He asks his doctor to order an HIV test; after hearing the distressing news that it is positive, the patient decides he does not want his wife to know.

The patient tells the doctor that the couple has unprotected vaginal intercourse about twice a week. His wife has no way of knowing that she is at risk of contracting AIDS from her husband. Her risk of becoming infected is probably about 20% per year (the best estimate is that the male-to female transmission risk is about 1 in 500 with each act

of unprotected vaginal intercourse)⁶¹. Of course she may be infected already, although the chances are reasonably high that she is not.⁶²

Gert analyzes this case as follows. The decision the physician faces is whether to honor the patient's explicit desire for confidentiality or tell the man's wife about his condition. If the physician tells the wife that her husband is HIV positive, the physician will directly *cause harm* to the patient in the form of mental pain, probable marital disruption, and weakened trust between the physician, the patient, and perhaps the medical profession generally. If the physician does not disclose the husband's condition to the wife, there is a significant probability that the wife will eventually contract the AIDS virus, a stigmatizing and potentially lethal disease.

In this case, Gert thinks most moral agents would publicly allow the violation of the man's confidentiality and all in cases that share the same morally relevant features (step two).

The following passage reveals why Gert thinks so.

When is it justified to reveal private information? In the particular situation, there must be a great likelihood that the harm caused by the disclosure is significantly less than the harm prevented. In calculating the harm caused by the disclosure, one must take into account not only the harm likely to be caused to the particular patient but also to the therapeutic relationship. One must, as with all violations of moral rules, take into account all of the morally relevant features of the situation. Finally, one must consider the consequences of everyone knowing that information disclosure is allowed in all cases with the same morally relevant features. If one believes that the harms that will result from everyone knowing that information disclosure is allowed in these kinds of cases is less than the harms that will result from information disclosure not being allowed, it is justified to reveal that information.⁶³

In analyzing this case, Gert claims that most moral agents would think that if the husband refuses to tell his wife about the husband's condition, then the physician should try to persuade the man to do so. If persuasion fails and husband refuses to disclose his condition to his wife, then the physician has a *professional duty* to violate patient confidentiality and tell the wife

⁶¹ N. Hearst and S. B. Hulley, "Preventing the Heterosexual Spread of AIDS: Are We Giving Our Patients the Best Advice?" *JAMA*, vol. 259, 1988, p 2428-2432.

⁶² BRF, p 188-189.

⁶³ BRF, p 189.

without his valid consent.⁶⁴ Gert also points out that some moral agents can still disagree as to whether the physician ought to tell the wife or not in this case. This disagreement makes the physician's decision to tell the wife about her husband's condition *weakly justifiable*, although, for Gert, it is a relatively strong justification.⁶⁵

Concluding that the physician's decision to share the husband's condition with the wife is weakly justifiable, in this case a decision that *most* fully informed moral agents would publicly allow, Gert hypothetically changes a few facts of this case to investigate how these new facts might change our intuitions about the justifiability of violating this man's confidentiality.

Suppose that the physician was reasonably certain that the husband was heterosexually impotent and that the couple had little interest in restoring normal sexual relations. The odds of HIV infection for each instance of sexual intercourse are only 1 in 500. Given these new facts, Gert thinks the physician would probably feel strongly that his duty was to preserve the husband's confidentiality, since the risk of HIV infection to the wife is significantly reduced, perhaps eliminated altogether.⁶⁶ Gert also thinks that most moral agents would concur with the physician's strong feelings on this issue and support preserving the man's confidentiality under these circumstances. However, even with the risks to the wife practically eliminated, a few moral agents might still think that the wife should be notified about her husband's condition. As a result, the physician's decision to preserve confidentiality would still be weakly justifiable. But the physician's decision is more strongly justifiable than the decision to preserve the man's confidentiality, assuming that the couple was sexually active.

Since Gert concludes that violating the man's confidentiality is the correct action to take in the original case, he digresses into exploring strategies for *preventing* confidentiality dilemmas

⁶⁴BRF, p 189.

⁶⁵BRF, p 190.

⁶⁶BRF, p 190.

from occurring, which Gert considers to be a duty of medical professionals. Gert argues that this case is one where the confidentiality dilemma could have and should have been avoided.

To Gert, this and many other moral conflicts between preserving patient confidentiality and preventing a relatively significant probability of significant harm can be avoided if physicians formulate explicit confidentiality policies and state these policies to patients up front. In this case, if the physician declares that he will have to tell his wife if the patient accepts the HIV test and it comes back positive, then for Gert the physician does not violate patient confidentiality in telling the wife.⁶⁷ Gert praises the fact that this practice is already wisely followed in many hospitals when HIV tests are given. Consent forms in these hospitals require patients to explicitly waive their rights to patient confidentiality on this one issue when the hospital believes it has a duty to notify the sexual partners of HIV positive patients.⁶⁸

Gert concludes his discussion of this case and the principle of confidentiality in general with three recommended confidentiality guidelines for medical professionals. The first, which I have already mentioned, is the *publicity guideline*. Patients should be told up front what the policies on revealing confidential information are. The second is the *justification guideline*. Violating patient confidentiality is justifiable if and only if it is highly probable that the harm caused by the violation will be so much less than the harm prevented by the violation that impartial moral agents would publicly allow all such violations in cases that share the same morally relevant features. The third guideline Gert proposes is the *adjustment guideline*. If the circumstances in a confidential situation change, the patient should be told up front how the

⁶⁷ This is a problematic statement for Gert to make. Stating the policy up front does not necessarily eliminate the physician's dilemma in this case. The physician still has a decision to make between competing obligations. If he tells the wife, he still violates the man's confidentiality. The strength of the physician's case is merely strengthened since the patient has consented to the consequences of a positive HIV test. In other words, the physician's justification is stronger, but the violation of confidentiality still remains. What if the man changed his mind and wanted to rescind his consent? What if the man assumed his test would be negative and thus did not take the physician's words seriously? Giving prior consent to follow a policy does not automatically eliminate the confidentiality violation.

⁶⁸ BRF, p 191.

situation has changed. The patient should then be informed as to how physicians can be expected to act given the revelation of new morally relevant facts.⁶⁹ For Gert, these three practical guidelines summarize his strategy for reducing many unnecessary patient confidentiality dilemmas.

Guidelines one and three are practical guidelines. The *publicity* guideline is meant to minimize some confidentiality dilemmas from ever occurring. The *adjustment* guideline accounts for changes that occur in the morally relevant facts of a case where confidentiality issues persist during longer courses of treatment. For Gert, the *justificatory* guideline is used when a confidentiality dilemma cannot be avoided by employing the other two preventative strategies. Here Gert simply restates the two-step procedure for assessing the justifiability of proposed violations of moral rules, i.e., gathering morally relevant facts and estimating the consequences of publicly allowing or not publicly allowing the violation in that and all relevantly similar cases.⁷⁰ The morally relevant facts are the harms caused to the patient from the violation of confidentiality, the likely harms prevented to by the violation, and other tangential harms that may accrue to the medical profession as a whole. The morally decisive question is always to ask if fully informed impartial moral agents would want all physicians to act that way when the facts are relevantly similar.

In this last case, I discuss Gert's analysis of a more complex case concerning the issue medical paternalism. For Gert, paternalism is "a pervasive moral problem in medicine."⁷¹ The problem of medical paternalism is raised in many discussions about the justifiability of

⁶⁹ BRF, p 192.

⁷⁰ Gert's description of the justificatory guideline is problematic because it is vague. It is not clear whether Gert means that confidentiality can be justifiably violated only if all impartial moral agent would publicly allow the violation, or whether he means that confidentiality can be violated if any impartial moral agents would publicly allow it. For Gert, strongly justifiable is a very strong requirement that demand unanimity of agreement on the correct course of action. Since Gert thinks the physician should be told of her husband's condition in this case, and since he also thinks that doing so may only be weakly justifiable, Gert only implies that the justificatory guideline includes weakly justifiable violations of confidentiality.

⁷¹ BRF, p 195.

euthanasia. Physicians often act paternalistically when they withhold relevant information from their patients or do not obtain valid consent for treatments that they unilaterally conclude are necessary under the circumstances. Even though paternalism is one of the most pervasive moral problems in medicine, it is not always morally unjustifiable. Sometimes paternalistic actions are morally required (strongly justifiable); at other times, moral agents disagree (weakly justifiable).⁷² The strength of a paternalistic action's justifiability hinges on the gravity of the harms that the paternalistic action prevents.

The concept of paternalism is logically grounded in the common moral system in virtue of its logical relationship to the concepts of competence, informed consent, and confidentiality. The concepts of competence and informed consent are explicitly contained within Gert's definition of paternalistic action.⁷³ Many instances of medical paternalism also involve violations of patient confidentiality.

All paternalistic actions violate moral rules and therefore must be justifiable using the two-step procedure. To restate Gert's definition of paternalism, medical professionals treat patients paternalistically when their actions are intended as a benefit, they know (or should know) that paternalistic action needs to be moral justifiable, they know that the patients have not given *valid consent*, and they think the patients believe they are *competent* to make their own treatment decisions. To Gert, these criteria have the important result of showing that good intentions are necessary but not sufficient for justifiable paternalism.

The Case of Mrs. O

Mrs. O, a 69-year-old woman, was admitted to the inpatient unit following a depressive illness of six months duration. Approximately one year before admission she was discovered on a routine examination elsewhere to have an enlarged spleen. No further studies were carried out.

Approximately six months before her hospitalization, Mrs. O's spouse suffered a heart attack and was subsequently confined to a nursing home. She stated in retrospect that her

⁷² BRF, p 195.

⁷³ See page 218 and footnote 57.

"world went to pieces" at that time. She gradually became depressed and experienced characteristic changes in appetite, weight, and sleep. She refused to seek medical attention. Eventually her husband called his lawyer, who summoned the police to her home where they found her in a state of neglect and brought her to the emergency room at the local hospital. She was admitted and noted to be depressed, but was alert, oriented, and cooperative. Positive physical findings included low red and white blood cell counts and a further increase in spleen size. She was seen by a consulting psychiatrist, who thought she was significantly depressed and recommended treatment with antidepressant medication. She agreed to take the medicine but did not improve. The patient's internist recommended a bone marrow examination and other laboratory studies. Mrs. O refused for reasons that she would not discuss, saying only that she did not "want to bother." She was transferred to a university medical center for a further attempt at evaluation and possible treatment.

This second evaluation confirmed the above impression. She was seen by a neurologist and by a hematologist, who recommended a CT scan, an electroencephalogram, a spinal tap, and a bone marrow examination. The patient's clinical condition continued to deteriorate, and she began to refuse most food and fluids. She refused to allow most of the recommended diagnostic tests to be performed. Repeated efforts by the staff and by her family to obtain her consent for these studies were unsuccessful and were now met by her saying, "I deserve to die."

Her doctors believed that she was indeed at risk of death through malnutrition and a body chemistry disturbance resulting from inadequate fluids and nutrition. Her husband and son were told the seriousness of her situation. Her son obtained an attorney, went to court, and on the basis of the clinical details provided, obtained temporary legal guardianship of his mother. He then authorized proceeding with the diagnostic procedures deemed necessary. These were done despite her objections. The hematology consultant concluded that the most likely diagnosis was myelofibrosis. Her long-term prognosis from this disorder was thought to be uncertain, but her prognosis for next several years was quite good.

Her son authorized proceeding with ECT for her now severe melancholia. She was treated initially without her consent and over her stated objections.

After the second treatment, she gave verbal consent to further treatments; after the fourth treatment she became brighter in mood, began eating well, and was much more verbal. After a total of ten treatments, Mrs. O reported that she felt quite good. She exhibited a mild post-ECT confusion, which subsequently cleared. She was able to express appropriate feelings of sadness about her husband's illness. She said that she was very grateful she had been treated. At her last follow up visit, several months after discharge, she was doing quite well.⁷⁴

To Gert, the case of Mrs. O is explicitly about whether paternalistic treatment towards Mrs. O is morally justifiable given the morally relevant facts. Rational moral agents intend to treat Mrs. O *for own good without her informed consent*, and they think Mrs. O believes that she

⁷⁴ BRF, p 241-242.

is *competent* to make her own treatment decisions.⁷⁵ Mrs. O understands her condition and, at least implicitly, regards the information provided to her about her diagnosis and the consequences of refusing treatment as accurate. She never denies the truth of what the doctors tell her about her condition and the likely consequences of not accepting treatment.

Despite understanding these facts, Mrs. O's depression shows a clear trend. She is severely depressed and growing physically and mentally worse. Antidepressant medications are ineffective. Mrs. O believes her life is not worth living and subsequently wants to die, even though her condition is not terminal, she is not in great physical pain, and she is not significantly and permanently handicapped. The doctors thus have a reasonable expectation that failure to treat her depression and administer further diagnostic tests will result in serious harms such as mental pain, physical pain, disability, and eventual death. There is a high probability that with electro convulsive therapy (ECT) Mrs. O will rebound from her depression and live a relatively flourishing life given her age and circumstances.⁷⁶ These treatments are safe and highly effective and will almost certainly *prevent* these grave harms.⁷⁷

For Gert, paternalistic actions always violate the moral rule against taking away a moral agent's freedom without informed consent. In this case, several other moral rules are also being violated. Declaring Mrs. O incompetent, i.e., not capable of making a rational treatment decision in these circumstances and forcing her to take ECT causes her psychological and physical pain. ECT it is an undignified, humiliating, and physically unpleasant procedure. These harms are

⁷⁵ The moral agents involved in the decision to treat Mrs. O without her consent are the doctors, Mrs. O, her husband, her son, the police, the attorneys, and the judge. Some of these moral agents are presumably now privy to some confidential medical information that they would not be privy to (except for the physicians and perhaps the husband) if paternalistic treatment was not warranted.

⁷⁶ BRF, p 242.

⁷⁷ Treating Mrs. O paternalistically violates moral rules to fulfill moral ideals; it causes Mrs. O a loss of freedom and some pain in order to prevent much worse harms. Paternalism is not unique in this respect. Medical professionals have a professional duty that frequently involves violating moral rules to fulfill moral ideals. Any treatment that causes pain to prevent a worse harm exemplifies this.

temporary and they nearly always have no negative long-term effects. The doctors, Mrs. O's husband, her son, the lawyer, the judge, and the police are complicit in violating the moral rule against causing Mrs. O this pain and taking away her freedom in order to prevent her from experiencing far worse harms.⁷⁸

To Gert, the moral agents determination that Mrs. O is incompetent is correct because Mrs. O fails to satisfy the criteria for patient competence. Recall that, for Gert, competence is the ability to make a rational decision in a particular situation.⁷⁹ Mrs. O's refusal of treatment is irrational. Her refusal is intentional. She has sufficient knowledge and intelligence to be fully informed about the consequences of her refusal (she actually is fully informed in this case), and her refusal involves a high risk of causing her significant harm without an adequate compensating benefit.⁸⁰ Since Mrs. O is incompetent, it is morally justifiable to waive the requirement to obtain her valid consent before proceeding with ECT.

Other facts support the physicians' and Gert's determination that Mrs. O's is incompetent in this case.⁸¹ Other responsible moral agents concur with the physicians' assessment of Mrs. O's incompetence. Mrs. O's son, the lawyers, the judge, the police and presumably her husband, agree that Mrs. O is incompetent therefore behaving irrationally. The police demonstrate their concurrence when, upon seeing her condition and the condition of her home, they take her to the hospital. The husband's lawyer implicitly concurs that Mrs. O is incompetent in virtue of carrying out the son's wishes without objection and proactively seeking a court order to give her

⁷⁸ Gert does not broach this issue, but Mrs. O is violating moral rules by causing mental pain to her family members. Her refusal of treatment puts her in preventable but grave danger. However, her actions are excused because of her severe depression. Holding her responsible for causing this pain to her family members would be analogous to holding a patient with Alzheimer's responsible for causing psychological pain to family members that she cannot recognize. Gert discusses the moral excuses in his theoretical works. I will analyze a case that concerns the issue of moral excuses in the next chapter.

⁷⁹ BRF, p 138-139. Mrs. O may be competent to make other decisions not associated with her treatment.

⁸⁰ MNJ, p 39; CM, p 83.

⁸¹ Gert does not mention these facts explicitly but they are implied by the actions of the parties in the case description.

son temporary legal guardianship to make her treatment decisions. The judge concurs with the doctors, the son's attorney, and Mrs. O's husband in granting temporary legal guardianship to her son. The husband implicitly demonstrates his belief that his wife is incompetent to make her own treatment decisions when he sends the police to her house and does not object to his son assuming legal guardianship. The son demonstrates his agreement that Mrs. O's treatment refusal is irrational when he takes steps to get a court order to administer treatment without Mrs. O's valid consent.

To Gert, it is crucial for the justifiability of paternalism in this case that each of the moral agents acting on Mrs. O's behalf has role specific *duties* to violate moral rules in order to fulfill moral ideals. In this case, the doctors have a professional duty to *prevent* death, pain, and disability to Mrs. O but must justify actions that deprive her of freedom and cause her pain without her valid consent. Mrs. O's husband and son have familial duties associated with Mrs. O's care, but for them violating moral rules to fulfill moral ideals must also be justifiable. The lawyer and the judge also have professional duties that often entail causing harm to prevent other harms. It is important that the moral agents who do directly and indirectly make treatment decisions on behalf of Mrs. O are in relevant positions of responsibility. If a moral agent without professional and familial responsibilities for Mrs. O's well being treated her paternalistically for her maladies in order to fulfill moral ideals, those actions would be morally unjustifiable unless exceptional circumstances such as an imminent emergency warranted the intervention.

The relationship between paternalism and universal moral rules (through the concepts of competence and informed consent) is complicated by the fact that paternalistic actions may violate professional moral rules that hold only for professionals working within national, regional, even familial boundaries. Medical ethics codes, government laws, and other policies may regulate these issues in a standardized way. The chief issue for Gert is that if culturally based professional rules are also professional *moral* rules, then violating these culturally based professional rules also violates universal moral rules. In the U.S. it is explicitly stated in the

AMA patient's bill of rights that physicians are required to obtain informed consent. While for Gert this is a morally justifiable policy, it is not central to the morality of paternalism.⁸² *Moral* justifications are determined by the two-step procedure, i.e., the morally relevant facts and whether fully informed moral agents would publicly allow paternalism in that and relevantly similar cases. Failure to obtain informed consent violates universal moral rules whether there is a law or official policy in place or not. If the AMA patients' bill of rights did not exist, then for Gert not obtaining informed consent would be still be immoral unless a proposed violation were justifiable using the two-step procedure.

For Gert, in order to assess whether the moral actors in this case are morally required or only morally permitted to treat Mrs. O paternalistically after accurately declaring her incompetent, it is necessary to ask the morally decisive question, i.e., "What are the estimated consequences of publicly allowing paternalistic treatment in this and all cases that share the same morally relevant facts, and what are the estimated consequences of not publicly allowing it?" According to Gert, moral agents should estimate the harmful and beneficial consequences of publicly or not publicly allowing paternalism in the case at hand and all relevantly similar cases. Though the two-step procedure does not provide airtight solutions to every case, it is the best one Gert thinks we have assuming that his description of the common moral system that everyone implicitly knows and uses is accurate. Gert concludes that paternalism is *weakly justifiable* in the case of Mrs. O, because it is clear that some, but not necessarily all fully informed impartial moral agents would publicly allow paternalism in this and relevantly similar cases.⁸³

⁸² To clarify, if a policy is also a law, then obeying that law is a moral issue. The point I'm making is that, for Gert, the presence or absence of a law does not change the key moral issue at stake in this case. A decision would still need to be made about paternalistic treatment, and that decision would need to be morally justifiable.

⁸³ BRF, p 242.

For Gert, it is relevant to the moral justification of paternalism in this case that the son sought a court order granting temporary guardianship.⁸⁴ For Gert, even if going to court were not legally required, he thinks it was crucial to the strength of the moral justifiability of paternalism in this case that Mrs. O's son did go to court.⁸⁵ Professionals in the legal system are in a better position to make impartial judgments consistent with legal precedent and traditional medical practice. In addition, Gert argues that more fully informed moral agents would publicly allow paternalism in this case with the court's blessing than without it. Going to court is also prudent because it sets a precedent for future cases that share the same morally relevant features, making it likely that future legal judgments about medical paternalism in similar cases will be more standardized and streamlined. Gert also argues that the decision to use the courts was appropriate since Mrs. O's situation is not an emergency that requires immediate action to save her from permanent disability or death. Some moral agents might disagree with this point. The son's decision to go to court does not put her life at immediate risk, though it does prolong her suffering for a time. Gert thinks this tradeoff is justifiable. Finally, going to court is prudent since it is impossible to determine how Mrs. O's condition might change during the course of treatment. Granting the son legal guardianship lets him make ongoing treatment decisions as needed without putting he or the doctors in other compromising positions with respect to further difficult moral decisions that may arise.⁸⁶ For Gert, an alternative course of action in a controversial case is better than another alternative course of action if that alternative course of action achieves similar results without violating moral rules, or is an alternative that a greater number of fully informed impartial moral agents would publicly allow in that and relevantly

⁸⁴ BRF, p 242. If the law required Mrs. O's son to take the matter to court, he was simply following the moral rules by doing so.

⁸⁵ Mrs. O's husband was too weak to go to court and so it seems right that another close and mature family member assume this responsibility.

⁸⁶ BRF, p 242. This statement assumes that Mrs. O provided no advanced directives in the event she was in circumstances like these. This would be unlikely, since most advanced directives concern decisions not to prolong terminal illnesses and do not resuscitate orders.

similar cases. Treating Mrs. O paternalistically without the legal support may have been another weakly justifiable alternative, but since fewer moral agents would publicly allow that option, that option would have been more weakly justifiable and therefore less preferable.⁸⁷

Gert implies here that allowing physicians and family members sole responsibility for making treatment decisions in Mrs. O's case and all similar cases would more likely increase public mistrust of the medical profession. The concern is that medical professionals and family members would too hastily override the rationally acceptable treatments decisions of patients. Excluding the courts also increases the likelihood that the prejudices of different doctors and family members will result in inconsistent decisions across the board from varied interpretations of what facts make paternalistic behavior morally justifiable. A likely result, Gert thinks, is that excluding the courts in cases like these would greatly increase the probability that more and greater harms will be caused over time.⁸⁸

To Gert, most cases of medical paternalism occur on a much smaller scale than the paternalism exhibited in the case of Mrs. O. More frequently these incidents of medical paternalism involve deception. For example, physicians sometimes deceive their patients in order to prevent harms they think will be caused by being candid about negative diagnoses. Physicians act paternalistically when they prescribe placebos in response to patients' requests for prescription medication for negligible illnesses. Physicians need to be careful to not interpret what they anticipate will be a negative reaction by patients as an excuse for unilaterally determining that those patients are incompetent and are not entitled to relevant information about their medical condition.

⁸⁷ It is reasonable to hold that the medical personnel in this case are fully informed. If ten medical professionals are involved in the decision to treat Mrs. O paternalistically, then if eight think that paternalistic treatment is justifiable with a court order, but only two think paternalistic treatment is justifiable without a court order, then getting a court order is a better alternative.

⁸⁸ Inferred from Gert's general statements about public policy provided in BRF, p 44-45.

Some physicians act paternalistically to order to avoid the personal discomfort of giving patients bad diagnostic news. If physicians act paternalistically only to avoid the personal discomfort of being the bearer of bad diagnostic news, then the criterion for valid consent "Physicians must assess patients' competence before acting on their consent" is being ignored. In many cases physicians making paternalistic decisions based on negative personal feelings will fail to provide relevant information to patients who are clearly able to make rational decisions about their treatment options. These acts of medical paternalism are morally unjustifiable. No fully informed moral agent would publicly allow physicians to act paternalistically in order to avoid the personal discomfort associated with giving patients bad diagnostic news. Valid consent requires an assessment of patient's competence. Patients who are capable of making rational treatment decisions should give valid consent for treatments. To Gert, they should be given relevant information, not be coerced, and should be treated as the rational moral agents that they are.

Some Criticisms of Gert's Case Analyses

The Case of Mr. J

A quick reading of Gert's analysis of this case may lead the reader to conclude that Gert is a consequentialist who disagrees with a particular consequentialist interpretation that justifies paternalistic deception in the case of Mr. J and similar cases.⁸⁹ It seems that Gert's chief criticism of the deception alternative for cases like Mr. J's is that it calculates consequences incorrectly. Gert thinks proponents of the deception alternative omit crucial and probable long-term consequences that would occur if deception were permitted in this and similar cases. Proponents of the deception alternative omit negative consequences to the profession's integrity, the negative consequences from a loss of public trust, and the benefits of long-term application of the

⁸⁹ This should not be surprising. Gert himself admits that his description of common morality has been labeled "Kant with consequences, Ross with a theory, and consequentialism with publicity." See Bernard Gert, "Morality, Moral Theory, and Applied and Professional Ethics," *op. cit.*

chastising and scolding alternative as a medical policy. Thus Gert concludes that chastising and scolding Mr. J would produce better consequences over time than the deception alternative. For Gert, moral agents consider the deception alternative counterintuitive because they implicitly recognize that paternalistic deception would not produce the best consequences. While this explanation seems to be a plausible interpretation of Gert's position, it is an incomplete interpretation of his position.

While it seems plausible to interpret Gert this way, it is not the interpretation that Gert wants the reader to have. Gert argues, as many philosophers do, that actual consequences are impossible to accurately predict.⁹⁰ By Gert's own admission, it is unclear whether his estimation of the consequences of allowing paternalistic deception in the case of Mr. J and similar cases are more accurate than proponents of this alternative would be. Interpreting Gert as merely engaging in dueling estimates of consequences with the alternatives provides a weaker argument in support of his interpretation than he actually does put forward.

I think Gert wants the reader to realize that predicting consequences is necessary but not sufficient for making informed professional decisions and judgments. Making consequences sufficient for determining one's moral obligations and permissions produces counterintuitive results that moral agents (implicitly employing the common moral system) would not normally accept. *This conclusion is not made clear enough in Gert's analysis of this case.*

For Gert, the best alternative in a case can actually be a decision where the estimated consequences are worse than alternatives. In the case of Mr. J, even if the consequences of paternalistic deception are better, on balance, than the consequences of chastising and scolding, Gert thinks that most fully informed moral agents employing the common moral system would publicly allow chastising and scolding and would not publicly allow deception. Gert does not go far enough to clarify this point.

⁹⁰ CM, p 63.

One strategy that I think Gert could use to clarify this point would be to consider hypothetical variation of the deception alternative. Imagine that the physical therapist in this case has a special gift. When she is genuinely concerned for Mr. J's best interest and the best interest of patients in similar situations, she can deceive her patients without their knowledge. Let us call this special ability a *hidden selfless deception prerogative*. The physical therapist may only use this gift when it is in her patients' best interest in cases that are relevantly similar to Mr. J's circumstances. Only this physical therapist knows she has this power and it does not bother her (cause her any mental pain) to use it. Because her prerogative is hidden and selfless, the profession is presumably not negatively affected and public trust is not undermined.

Considering the hidden selfless deception prerogative against the chastising and scolding alternative, Gert would still conclude that chastising and scolding is morally preferable. For Gert the morally decisive issue is to consider the estimated consequences of *publicly* allowing and not allowing an alternative. Gert's publicity requirement is crucial for showing that the physical therapist's special gift does not make her paternalistic deceptions morally justifiable.

Would rational moral agents employing the common moral system the way that Gert describes it publicly allow physical therapists to use such a gift to deceive them when it was in their best interest? Gert, I think, would answer no to this question. If moral agents were fully informed about the physical therapist's special gift, most moral agents would not *publicly* allow her to use it.⁹¹ The hidden selfless deception prerogative elucidates Gert's position that common morality values consequences, but not exclusively. Moral agents would find it morally objectionable to utilize a medical system that encouraged physical therapists with these special gifts to deceive patients simply because it produced better results. Most impartial moral agents would rather know the truth about their need to complete the therapy regimen and prefer to be

⁹¹ It almost seems as if Gert eliminates the hidden selfless deception prerogative by definition. Morality, to Gert, is by definition a public system. If some physical therapists actually had hidden selfless deception prerogative powers, then morality would no longer be a public system that is everyone governed by it knows and understands.

chastised and scolded if they become temporarily incapable of making a rational decision about their therapy after suffering something like a stroke.⁹²

Even though Gert does not adequately broach the limitation that publicity places on consequences in his analysis of this case, he does do so in other places in his work. Gert uses cheating to discuss these limits. Cheating is closely related to the universal moral rule that proscribes deception.⁹³ To Gert, there are many situations where a person can cheat and get away with it without anyone finding out. Sometimes these incidents of cheating can produce a favorable balance of consequences; they are usually intended to provide some favorable balance for the cheater. This similarity makes successful cheating analogous to my example of the physical therapist with the hidden selfless deception prerogative. In both cases, Gert argues that answering the morally decisive question in the second step of the two-step procedure captures the intuitions of most conscientious moral agents on these issues. Would impartial moral agents publicly accept cheating in cases where the cheater will not get caught and the cheater gets a tangible benefit? For Gert the answer is no. Most moral agents think that cheating is immoral even though the balance of consequences supports cheating in some cases.

While I have not criticized Gert's conclusion in the case of Mr. J, I have pointed out that his position as articulated does not adequately clarify his view that consequences alone are not sufficient for describing the moral judgments that most moral agents implicitly employing the common moral system would make. The publicity constraint is crucial for eliminating counterexamples that produce better consequence but which are counterintuitive to moral agents.

⁹² MNJ, p 191-194, 236. This analysis does not eliminate deception altogether as an alternative that moral agents would publicly allow in every situation. There may be situations where deception is an alternative that some moral agents would publicly allow. The fact that many moral agents would publicly allow intelligence agents to use deception to protect national security is evidence of situational character of these judgments.

⁹³ MNJ, p 191. This makes Gert's example of cheating particularly relevant to the deception alternative as described in the case of Mr. J.

Gert fails to address another issue that I think is crucial to assessing the justifiability of the physical therapist's decision to paternalistically chastise and scold Mr. J. It is not clear whether this is merely an oversight on Gert's part, or whether he thinks it is not necessary to raise the issue in this case. The justifiability of the physical therapist's chastising and scolding is strengthened by the fact that she made reasonable attempts to persuade Mr. J to will himself to complete the therapy. She tells Mr. J that during the immediate post-stroke period it is crucial to follow established therapy protocols in order to achieve maximum therapeutic benefit to the affected limbs. Had she not made conscientious attempts to persuade Mr. J to discipline himself, her acts of chastising and scolding would have been more weakly justifiable. Fewer fully informed moral agents would publicly allow her to act paternalistically in this way. Trying to persuade someone to avoid irrational behavior does not violate moral rules. If an alternative is available where professionals can fulfill their professional duties without violating moral rules, then professionals should exhaust these alternatives before moving onto alternatives that do violate moral rules. The physical therapist in this case apparently took reasonable steps to do this when she attempted persuade Mr. J before deciding that chastising and scolding him was a morally justifiable alternative. Gert only implies that the physical therapist in this case took these reasonable steps.

Another reason I think Gert should have discussed the physical therapist's efforts at persuasion is the following. Failing a conscientious attempt to persuade Mr. J to do something that is clearly in his best interest provides empirical support to the determination that Mr. J is behaving irrationally and is therefore incompetent to make his own treatment decisions regarding physical therapy in this situation. Her persuasion indicates that, while Mr. J seems to understand and appreciate his condition and the need to complete the therapy protocol, he lacks the will to choose the only rational alternative. Mr. J knows or should know that his failure to continue complete therapy significantly increases his probability of suffering long-term disability and pain without providing an adequate compensating benefit, even if progress is slow. Satisfying his self-

pity or giving into his temporary frustration and discouragement are not adequate compensating benefits in these circumstances. Since there are time considerations here, the physical therapist knows that she cannot continue her attempts to persuade Mr. J for very long.⁹⁴

I think Gert fails to mention one more reason that most moral agents would not publicly allow deception in this and similar cases. Most moral agents are astute enough to realize that if deception was justified in this and similar cases, then health care providers would probably use consequences alone to justify other morally objectionable paternalistic actions even when patients were, in fact, actually competent to make their own treatment decisions. Moral agents might only think about these implications implicitly. Publicly allowing deception when health care professionals view it as in the patient's best interest would inevitably lead to other violations of patient autonomy such as overriding treatment decisions that are based on religious beliefs (such as when a Jehovah's Witness refuses a blood transfusion). Or it might give health care providers ammunition to act paternalistically to override a patient's advanced directives regarding some treatments for terminal illness when the probabilities of success are unclear or reasonably minimal and the treatment is very painful. Finally, publicly allowing paternalistic deception could tempt medical professionals to interpret patient competence too loosely. Some physicians would be more easily tempted to routinely tell a Jehovah's Witness that he would not receive a blood transfusion, but do so anyway without his valid consent. These are crucial implications that Gert does not address in his analysis of the case of Mr. J. These implications help to explain why paternalistic deception in the case of Mr. J and similar cases is an alternative that fully

⁹⁴ The physical therapist has time limits in which to operate. She cannot attempt to persuade Mr. J indefinitely. Presumably, the physical therapist could have engaged other family members in an attempt to persuade him further. This strategy may have been more successful. It is another question as to whether alternative methods of persuasion would be supererogatory, or whether she ought to have tried other methods of persuasion. I am inclined to conclude that her efforts were reasonable. When has she done enough to persuade?

informed impartial moral agents employing the common moral system would probably not publicly allow.⁹⁵

The Case of Mrs. R

One problem with Gert's analysis of the case of Mrs. R is that it is unclear why coercion of family members does not invalidate consent while coercion from medical professionals does invalidate consent. The trivial way Gert resolves this problem is by definition. Gert specifically says, "A physician may not coerce a patient into consenting."⁹⁶ Obviously, this criterion as stated omits coercion from family members.

However, making this distinction plausible requires more than stipulation. Since Gert considers Mr. R's coercion as a fact-of-life condition for Mrs. R that is analogous to the pain of acute appendicitis, then presumably the coercion of physicians is not a fact-of-life condition. Although I agree with Gert on this distinction, I disagree that Gert has explained the distinction satisfactorily by using one analogy. The true force of the distinction between physician and family coercion lies in the fact that patients can choose their physicians while they cannot choose their family members. Thus, the physician a patient uses is not a fact-of-life condition. Gert's analogy to acute pain only implies this fact. However, just because patients cannot choose their family members does not mean that patients have no power to refuse to succumb to the coercive pressure of family members. The freedom of patients to resist the coercion of both physicians and family members is similar enough to make the distinction between family and physician coercion less clear than Gert argues it is.

Gert's analogy to appendicitis fails from the perspective of Mrs. R in another way. Mrs. R obviously can decide that she does not want to have her treatment decisions decisively

⁹⁵ Gert addresses these concerns in other works. I think, however, that since medical professionals are not likely to take the time to work through his moral theoretical works, it would be good to broach some of these issues in case analyses that medical professionals are more likely to read.

⁹⁶ BRF, p 152.

influenced by family coercions as long as she can live with the alternatives, such as residing in a state run nursing home. In contrast, if Mrs. R had acute appendicitis, she would only have two options, surgery or highly probable and potentially fatal peritonitis.⁹⁷ She could not exercise personal freedom in same way without acting in a way that all moral agents would, under normal conditions, consider to be irrational. In contrast, if Mrs. R had chosen the state run nursing home, her choice would have been rationally allowed, even if it were not the best choice for her to make.

Another way Gert's analysis of the case of Mrs. R seems thin is that Gert does not fully explore additional alternatives. Should the medical staff really just treat his coercion as a fact-of-life situation? If the husband refuses the phone calls of the medical staff, should the medical staff send a representative over to his house to attempt to persuade him to stop his paternalistic behavior, or to try another strategy with Mrs. R, such as persuading her that her fear of ECT would lead her to make an irrational treatment decision? Mrs. R is not in serious danger at the moment, so the situation does not qualify as an emergency. It is understandable if time or other institutional pressures precludes the medical staff treating Mrs. R from taking these additional steps in pursuit of moral ideals (ideal consent).⁹⁸ Gert does not mention how these alternatives and institutional pressures might affect the staff's decision to consider Mrs. R's consent as valid after such a short period of time. Perhaps more pressure should have been brought to bear on Mr. R, assuming that such pressure is legal and also morally acceptable.

Another criticism of Gert's analysis of this case I find particularly strong. Gert assumes that Mrs. R's behavior is rational and he never questions her competence. Is her situation really that different from the case of Mrs. O, another patient that Gert argues is

⁹⁷ According to WebMD, an internet health care information service, it is occasionally possible, but rarely advisable, to drain the appendix of pus rather than remove it altogether. In some situations this might be a rational alternative. However, I do not think this alternative undermines my distinction between appendicitis and family coercion on the issue of personal choice. See online posting of this information at <<http://my.webmd.com/content/healthwise/147/36610.htm?lastselectedguid={5FE84E90-BC77-4056-A91C-9531713CA348}>>.

⁹⁸ See page 212 and footnote 45.

incompetent? I think it is plausible to argue that Mr. R and the physicians have grounds for concluding that if Mrs. R's refused ECT, her action would be irrational and therefore make her incompetent in that situation. Mrs. R is severely depressed and ECT offers her the only safe and reliable method for relief from her symptoms and maintaining the support of her husband. ECT provides a safe and effective treatment with minimal risk. The benefits and harms are easy to calculate in this case and other cases like it. If Mrs. R is incompetent, the requirement for obtaining her valid consent is overridden, which opens the door for morally justifiable paternalistic behavior on her behalf. This analysis seems very plausible. I am puzzled why Gert ultimately considers Mrs. R to be competent and Mrs. O to be incompetent.⁹⁹ It seems that Gert would have to conclude that paternalistic treatment of Mrs. R is at least weakly justifiable. Some fully informed moral agents would publicly allow paternalistically treating Mrs. R with ECT in this case and support doing the same in relevantly similar situations.¹⁰⁰

An unfortunate implication of concluding that Mrs. R is competent in this case is as follows. If Mr. R did not coerce Mrs. R to have ECT, and if subsequently she chose not to give valid consent to have ECT, then the physicians would be required to honor a decision based on an irrational fear that clearly promises negative consequences that all fully informed moral agents want to avoid. However, if paternalistic treatment of Mrs. R is at least weakly justifiable, and I think it is, then according to Gert it would be permissible for the medical staff to treat Mrs. R paternalistically through the courts or other acceptable mechanisms, perhaps even unilaterally.

⁹⁹ What Gert seems to be implying here is that Mrs. O's refusal makes her incompetent because she is in danger of physical death soon if she does not take ECT, while Mrs. R is not going to die. I do not think this difference is decisive in determining that Mrs. O is irrational and Mrs. R is rational. Both have symptoms that are very negative and both have a safe treatment option available to them at minimal to no risk. One is catatonic; the other is paralyzed by fear. Both causes are sufficient to make their refusals evidence of incompetence.

¹⁰⁰ My argument that paternalistic treatment of Mrs. R is at least weakly justifiable is not meant to suggest that any paternalistic treatment is justifiable. Mr. R's coercive treatment is a morally unjustifiable paternalistic action in this case that reflects a lack of love and respect for his wife. Mr. R could support paternalistically treating Mrs. R and handle the issue in a more caring manner.

Gert's theory supports this interpretation of the situation as readily as it supports the interpretation that she is competent and dealing with fact-of-life issues.

That Gert's theory can be used to support different interpretations of the case of Mrs. R and other cases like it illustrates why moral agents may disagree about the facts of a case and how those facts support different interpretations of the harms and benefits at stake. If fully informed moral agents disagree about how they would assess competence of Mrs. R, this disagreement is a disagreement over the facts and the moral decisions these facts morally justify. These disagreements are a fact of life for moral agents weighing the morally justifiable alternatives in complex cases. Gert's theory accounts for these types of disagreements and some of these disagreements are irresolvable.

Case of the Bisexual Husband

Gert is correct to compare the actual case of the bisexual husband with a case where important morally relevant facts are changed. These comparisons do help to tease out our moral intuitions about moral decisions in concrete cases. Gert asks what moral agents would publicly accept if the physician knew that the husband and his wife had little interest in restoring normal sexual relations. The risk of HIV infection to the wife would be practically eliminated while the harms to the man, his marriage, the therapeutic relationship, and the integrity of the medical profession would remain unharmed.¹⁰¹ With these new facts, Gert asserts that the physician would *feel more strongly* that his professional duty in that case was to preserve the man's confidentiality. Gert thinks that rational moral agents aware of these facts would publicly allow preservation of the man's confidentiality.

While these comparisons are useful for teasing out our moral intuitions about a particular case, Gert articulates the comparison in a way that adds little to his earlier analysis. If the husband were, in fact, heterosexually impotent, then even if the physician *felt* that he had a

¹⁰¹BRF, p 190.

stronger duty to preserve the husband's confidentiality, his decision would still presumably be weakly justifiable, since at least a few moral agents would think that the physician should tell the wife that her husband is HIV positive even if they were not sexually active.

Gert also makes a subtle change in his language when he makes the comparison to the actual case. When discussing the facts of the *actual case*, Gert assesses the justifiability of the physician's decision using step two of his decision procedure, assessing the decision in terms of what fully informed moral agents would publicly allow given the risks of infection to the wife with each sexual act and over time. In contrast, when Gert assesses the *comparison case* to tease what facts would make the intuitions of moral agents change, (if the husband were heterosexually impotent), then Gert assesses the justifiability of the physician's decision in terms of the strong feelings of the physician. In the actual case Gert seems to infer the following. If the physician is unclear about what to do, then he should apply step two and make a moral decision based on the results he concludes that step two provides. In the comparison case, Gert implies that physicians should obey their *strong* feelings.

This difference in Gert's approach in the actual and hypothetical case is significant. If medical professionals are in a professional quandary as the physician is in the actual case, then Gert wants to apply step two of his decision procedure and let that guide the decision and illuminate reasonable alternatives. If, medical professionals have strong intuitions about a particular alternative, then Gert implies (perhaps unwittingly) that these feelings (intuitions?) are sufficient to make those decisions. However, moral intuitions may be mistaken, and professionals should be wary of trusting them too willingly. Gert too readily implies that he trusts the physician's intuitions in the comparison case. If the physician has similarly strong feeling about preserving the man's confidentiality in the actual case, then his intuitions would be suspect. I do think the physician's moral intuitions in the comparison case are correct, but that fact is beside the point. Gert's overarching medical ethics goal is to demonstrate the relevance of his description of common morality and two-step decision procedure for making moral decisions

in concrete cases. To reinforce the applicability of his views, he should use his decision procedure consistently as a decision making guide even in obvious comparison cases. Doing so shows that his moral theory and decision procedure does not contradict the strong intuitions of fully informed moral agents making moral decisions in concrete cases.

Finally, even if Gert had used the two-step procedure for the actual and hypothetical cases, he would still have to conclude that the physician's decision is only weakly justifiable in both cases, differing only in the relative strength of the moral intuitions held by informed moral agents and the alleged different percentages of moral agents who would publicly and not publicly allow a particular decision. Gert's analysis of both cases omits discussing the crucial issue of assessing the relative strength of weakly justifiable options. This issue is left untouched in each of the four case analyses that I reviewed.¹⁰² If most moral agents agree that the physician should tell the wife about her husband's condition, a few moral agents presumably still disagree. A few moral agents may place a much higher value on preserving patient confidentiality than they place on eliminating a moderately significant but relatively small risk that an innocent person will contract a dangerous communicable disease. If most moral agents agree that the physician should not tell the wife if the couple is not sexually active, then presumably a few moral agents still disagree. Some moral agents would probably conclude that the wife should be told of her husband's condition anyway.¹⁰³

¹⁰² I have discovered that my concern with Gert on the issue of assessing competing weakly justifiable alternatives is not new. Kettner raises the same concern in "Gert's Moral Theory and Discourse Ethics," in *Rationality, Rules, and Ideals: Critical Essays on Bernard Gert's Moral Theory*, edited by Walter Sinnott-Armstrong and Robert Audi, Lanham: Rowan and Littlefield, 2002. On page 45, Kettner complains that "In the face of real [moral] controversies, the test [of public allowability] is either so vague as to settle no disagreement at all or so generous as to leave all parties to the controversy 'weakly justified,' a normative label that is reassuring at best and devoid of any reflective disagreement at worst." However, while Kettner finds this conclusion problematic for Gert, Gert finds it indicative natural facts. Gert's reply to Kettner on page 268 is "I sympathize with Kettner's lament, but it is not a criticism of my theory but a lament about the way the world is. All parties to a moral controversy are likely to be weakly justified in their position. That is the way the world is; my theory merely reflects this fact."

¹⁰³ These comments assume that there is no policy or law in place that mandates what physicians must do in cases like these.

Controversial cases are all weakly justifiable. Gert's analysis of specific cases in *Bioethics: A Return to Fundamentals* provides a unique opportunity to raise substantive issues relative to assessing competing weakly justifiable alternatives in the context of particular case analyses. Gert discusses the comparative justifiability of weakly justifiable alternatives in his other theoretical works and in the theoretical chapter at the beginning of *Bioethics: A Return to Fundamentals*. However, most moral agents who are responsible for making difficult moral decisions in controversial medical cases will never read his other theoretical works unless they happen to be taking a course on Gert's moral theory. Laying out practical steps for assessing the comparative justifiability of weakly justifiable alternatives in controversial medical ethics cases would go along way toward demonstrating the efficacy and the relevance of his theory and decision procedure in the controversial cases where it would be most appreciated.

Another criticism of Gert's analysis of the case of the bisexual husband concerns his discussion of strategies for preventing many confidentiality dilemmas before they occur. Eliminating unnecessary confidentiality dilemmas is a noble professional goal. This is obvious. Many hospitals already have policies in place to manage confidentiality issues with HIV cases. However, while these preventative strategies are wise to have, preventative strategies do not provide much help to medical professionals who are reason already past the point of making an explicit declaration of confidentiality policies in specific situations. The physician in the case of bisexual husband is in such a situation, and his decision is only weakly justifiable. Gert could have spent a few more sentences discussing why it is better to violate patient confidentiality in this case than not to before launching into preventative strategies. Such guidance would be valuable to medical professionals, especially in the light of Gert's view that weakly justifiable violations of moral rules may be punished.

The Case of Mrs. O

One issue that Gert does not broach in his discussion of this case is how a carefully chosen analogy or comparison case can tease out and clarify our intuitions about the actual case

under consideration. This is an important technique of casuistry that Gert could have but does not use in discussion the case of Mrs. O. Consider the following "sister case" that seems to have most of the same morally relevant features of the case of Mrs. O. In this sister case our intuitions do not as readily support the justifiability of paternalistic treatment.

Suppose someone has a large mole on his face. The mole is not medically dangerous, but it is an eyesore that causes the man embarrassment and makes him self-conscious. Removing this mole would be a simple procedure with little risk of causing nontrivial harms. Removing the mole would cause minimal scarring with a 100 percent chance of significantly improving the man's appearance and self-confidence. However, suppose this man is so afraid of needles and scalpels that these fears prevent him from having the mole removed. This causes him to endure continued painful embarrassment and self-consciousness without an adequate compensating benefit. On Gert's view, this man's refusal of treatment is obviously an irrational decision. His refusal is an intentional action by a moral agent who is fully informed of the consequences of his refusal. He knows that removing the wart will avoid harms that all moral agents want to avoid and want those that they care about to avoid. The man simply cannot will himself to overcome his fears. No fully informed impartial moral agent would act this way or advise those they care about to act this way.

In light of the man's irrational refusal of treatment and the negative consequences it brings, would it be justifiable to force the man to have the mole extirpated? Since this man is incompetent to make a rational decision in this situation, why is it not morally justifiable to treat this man paternalistically, to make him have the mole removed without his valid consent? If paternalistic action on Mrs. O's behalf is morally justifiable, and Gert thinks it is, then what relevant differences make this example different? Can Gert's theory account for these differences? Both Mrs. O and the man are incompetent. In both cases the treatment is safe and highly effective, and the harms the treatment causes are temporary, not severe, and not permanent. In both cases the probability that the treatment will prevent significant long-term

harms is high. Our intuitions about the moral justifiability of paternalistic treatment in these cases are, I think, very different.

Gert, would argue that the mole case produces different intuitions from the Mrs. O case because Mrs. O's situation is life threatening and the man's situation is not. The consequences of her refusal of treatment are much more severe. The man's fear of needles and scalpels only produces a moderate to severe level of psychological discomfort. Paternalism is justifiable for Mrs. O because the harms prevented to her are *sufficiently grave* that fully informed moral agents would publicly allow paternalistic treatment in Mrs. O's case and all cases like it. The opposite result is achieved when step two is applied to the man's situation.¹⁰⁴

For Gert, the crucial issue that explains the intuitions of moral agents implicitly employing the common moral system in these cases is the *estimated consequences* of publicly allowing or not allowing paternalistic treatment in both case and all similar cases that share the same morally relevant features. These differing estimated consequences are decisive for explaining why moral agents would more willingly accept paternalism in cases like Mrs. O's but not in cases like the man's. Most moral agents would think that paternalistically treating the man is a morally unjustifiable deprivation of the man's freedom, a violation of the moral rule "Do not deny freedom." Most moral agents would conclude that the argument for treating Mrs. O paternalistically is a comparatively strong, though perhaps still weakly justifiable deprivation of her freedom, even though forcing her to take ECT causes her some comparatively minor harms (compared to the consequences of not having ECT) without informed consent.¹⁰⁵ The balance of

¹⁰⁴ What is interesting and potentially problematic for Gert is how he would respond to the fact (assuming it were true) that one percent of fully informed moral agents would publicly allow treating the man with the mole on his face paternalistically. Gert would then have to conclude that treating the man paternalistically is weakly justifiable since at least one fully informed moral agent would publicly allow the extirpation of the mole without the man's valid consent.

¹⁰⁵ If the mole became cancerous and the man's fear of needles still precluded him from getting treatment, then the life threatening nature of the mole would add a significant morally relevant fact that could make paternalistic treatment justifiable. The case would be more relevantly similar to the case of Carol.

likely harms prevented and harms caused makes paternalistic treatment in the man's case morally unjustifiable even if the man suffers moderate psychological pain for the rest of his life.

If more controversial but somewhat similar cases of proposed medical paternalism were compared, at some point the gravity of harms prevented by paternalistic action would begin to make the intuitions of an increasing number of fully informed moral agents begin to shift from not publicly allowing paternalistic treatment to publicly allowing it. Gert unfortunately does not use any examples like these to tease out morally relevant differences between cases that appear *prima facie* to be very similar. These comparisons are a staple of casuistry that Gert could have used effectively in his analysis of the case of Mrs. O.

Another issue that Gert does not broach in this case that would have been worth investigating is the question of what the appropriate course of action would have been had the moral agents acting on Mrs. O's behalf disagreed about how to treat her. Presumably the family's wishes have *prima facie* priority over the physicians' wishes. In this case however, it would add complexity and instructive value to the case to consider how Gert's decision procedure would work to assess the case if crucial moral players such as the son, the physicians, and even the husband, had disagreed about what they thought should be done. In this case the harms prevented are grave enough and the costs so small that it might have been justifiable for the physicians to act unilaterally, or to take disagreeable family members to court to obtain permission to treat Mrs. O for her own good. In cases like the case of Mrs. O where the harms prevented are great and the harms caused are minor and temporary, it seems intuitively plausible that the doctors would have a duty to seek legal permission to administer safe and highly effective treatments paternalistically even if the family members disagree.¹⁰⁶

Systemic Problems with Gert's Case Analyses

¹⁰⁶ This claim is controversial and, absent a clear public policy, the decision would have to be handled on a case-by-case basis. For example, if Mrs. O's refusal resulted from religious beliefs, her decision might have to be honored. If her refusal were the result of decision-specific incompetence from a factor like clinical depression, it might be more justifiable to override her refusal paternalistically.

Some criticisms that I have with Gert's application of his moral theory and decision procedure to particular medical ethics cases are systemic criticisms. These criticisms, I argue, are relevant to all of the cases I reviewed that Gert analyzes.

My first criticism concerns Gert's definition of paternalism. Of the criteria that Gert argues satisfy the definition of paternalistic action, his second criteria, that the paternalistic actor recognizes (or should recognize) that his action towards the patient is a kind of action that needs moral justification, is problematic. Paternalistic actions may need to be morally justified, but paternalistic actors need not recognize this fact, nor is it necessarily the case that they always ought to recognize it if they do not. Some persons, it seems, can act paternalistically without ever recognizing that their action requires moral justification. Perhaps they live in a culture where paternalism is routine towards a woman or a slave for no other reason than simply because the patient is a woman or a slave. These reasons are presumably not moral reasons. To say that moral agents in these cultures ought to recognize the need to justify these paternalistic actions seems contrary to the facts. Still, these actions can be paternalistic, i.e., the actors may intend to benefit a slave by his action, know he does not have the slave's consent, and regard the slave as thinking that he is competent to make his own decision in the matter.

One way Gert might answer this criticism is to state up front that paternalistic actors may implicitly (subconsciously) think that paternalistic actions require moral justification but not explicitly think so, or they just might be blind to a fact that they subconsciously recognize. This approach would follow his pattern of describing how moral agent normally employ the common moral system implicitly like the grammar system. However, Gert never mentions this possibility.¹⁰⁷ Another answer Gert might give would be to introduce a distinction. Gert's second criterion says only that paternalistic actors recognize (or should recognize) that paternalistic

¹⁰⁷ Gert tries, unsuccessfully I think, to overcome this criticism by distinguishing between paternalistic behavior and paternal or parental behavior. For Gert paternalistic actions are actions where the actor recognizes that the action requires moral justification. Paternal behavior does not require recognizing this. The distinction is *ad hoc*. See BRF, p 198.

action requires moral justification. This is quite a different thing from saying that the paternalistic actor recognizes (or should recognize) that the paternalistic action requires *adequate* moral justification. Moral agents who treat slaves or women paternalistically could argue that they are morally justified in acting that way simply because that is how slaves and women ought to be treated. This justification is not adequate, but it is a moral justification.

Gert attempts to overcome this criticism by introducing what I think is a spurious distinction. Gert argues that behavior that does not meet this second criterion of paternalistic action is not paternalistic but paternal or parental behavior. Gert does not tease out the distinction between these two behaviors and I do not see a relevant distinction. If a parent makes his teenager practice the piano, that action is paternalistic even if the parent does not understand that making his child practice the piano violates moral rules and needs to be justifiable. It seems that Gert is making an *ad hoc* distinction between paternalistic and paternal behavior in order to preserve the necessary relationship between his second criterion for paternalistic action and all morally justifiable paternalistic actions.

Another systematic criticism that I have is as follows. When Gert applies the decisive second step of the two-step procedure (implicitly or explicitly) to medical ethics cases, he equivocates when assessing the justifiability of alternative courses of action. The case of the bisexual husband illustrates this equivocation. Gert judges that "most" persons (presumably he means fully informed impartial moral agents) think that the husband should tell his wife about his condition, and that if he does not the physician has a professional duty to tell her. But since "some" moral agents are also likely to disagree with this decision, the physician's violation of confidentiality would only be weakly justifiable. Since violating confidentiality is weakly justifiable in this case, the decision to preserve the man's confidentiality is also weakly justifiable. Thus, on the one hand, Gert's view is that both of these alternatives are weakly justifiable, and on the other hand one alternative is strongly justifiable compared to the

alternative. This way of talking about the relative strength of weakly justifiable options is confusing.

In analyzing this case, Gert introduces an implicit standard of judgment when it would have been better for him to introduce an explicit standard. Gert's implicit standard is to judge two weakly justifiable alternatives democratically by the votes of informed moral agents acquainted with the morally relevant facts of a particular case. Thus in the case of the bisexual man, if a majority of informed moral agents opt for telling the wife, then that alternative is more strongly justifiable than the minority position. If Gert compares weakly justifiable alternatives in this way, and it seems that he does, then he should say so in his analysis and show what this method of arbitration is acceptable. Instead he bats around vague comparative words like 'some,' 'a few,' and 'most' when considering what fully informed moral agents would publicly allow.

Making controversial moral decisions based on majority opinions among fully informed moral agents may be warranted because of various empirical limitations, but it is a practice that is fraught with the risk of serious moral mistakes. Suppose ten physicians are equally informed of the morally relevant facts in the case of the bisexual man and are conferring about whether or not to tell the wife about the husband's condition. Suppose nine think confidentiality should be preserved and one thinks the wife should be told. Would this distribution of moral judgments show that a decision to preserve the man's confidentiality is really more strongly justifiable than telling the wife? Not necessarily. The lone physician's judgment that the wife should be told might be the *right* thing to do in this case; yet, according to Gert, this physician's judgment seems to be a much more weakly justifiable alternative.¹⁰⁸

¹⁰⁸I admit that moral judgments supported by strong majority opinions among fully informed moral agents are probably right more often of the time, and I do think that sometimes this is the only practical alternative. The U.S. Supreme Court operates this way all the time. However, there are obvious cases where this procedure can lead to unconscionable evils, particularly in places like totalitarian regimes or at times where the "moral experts" are ignorant of crucial facts which results in their making bad decisions. Sometime lone moral agents with revolutionary ideas take positions that are morally superior but which others in a culture have not yet come to understand.

Gert does *opaquely* discuss assessments of weakly justifiable alternatives in theoretical works that medical professionals will probably never read. For Gert, weakly justifiable alternatives are supported by more or less adequate reasons. In *Morality, Its Nature and Justification* Gert states, "I count any reason as adequate if any significant group of otherwise rational people regard that reason as adequate, that is, if they regard the harm avoided or benefit gained to compensate for the harm suffered. People count as otherwise rational if they do not normally act on irrational desires without an adequate reason."¹⁰⁹ In his theoretical chapter of *Bioethics: A Return to Fundamentals*, Gert says, "a reason [for action] is adequate if any significant group of otherwise rational people regard the harm avoided or benefit gained as at least as important as the harm suffered."¹¹⁰

Considering my earlier comments about how Gert uses the words 'most,' 'some,' and 'a few,' to vaguely describe how many fully informed moral agents would publicly or not publicly allow a violation of moral rules, do most, some, or a few moral agents connote a significant group? If the lone physician is correct that the wife should be told of her husband's condition, do the nine mistaken physicians connote a significant group while the lone physician does not? Presumably this is what Gert means by significant group. What if the lone physician has many more years of experience dealing with cases like the case of the bisexual man than the other nine physicians? Does a significant group consist of numbers alone or also in years of experience dealing with a particular type of situation? These considerations are the sort of fine-grained considerations that Gert's discussion of weakly justifiable moral decisions and the role of significant groups in assessing reasons for action does not address.

If we apply Gert's account of significant group to the medical profession, it seems that adequate reasons for making a particular decision in a controversial case are reasons that some

¹⁰⁹ MNJ, p 57.

¹¹⁰ BRF, p 28.

cadre of experienced medical professionals (who understand the morally relevant facts of the case in question) concurs makes the decision one that they would publicly allow in that and all relevantly similar cases. Physicians are generally the most fully informed moral agents with respect to medical issues. In virtue of their training and experience, medical professionals are in the most favorable epistemic situation to carefully understand the harms caused and prevented by making a particular decision into a publicly acceptable medical practice. These professionals are in a better position to assess the justificatory support for various weakly justifiable alternatives. They are generally more qualified to sit on medical ethics boards, and they are more qualified to advise legislators about medical practices that need to be reinforced with carefully crafted laws. They also may be more qualified to work in concert with legislators and their staffs to help write these laws and policies.¹¹¹

I think this is an intuitively plausible interpretation of Gert on the issue the relationship between “significant group” and “adequate reasons” as it applies to assessing controversial medical ethics cases. It is a fact that trained medical professionals are normally most informed of the morally relevant facts of a particular case and are the most competent to grasp the morally acceptable treatment alternatives.¹¹² Medical professionals are also most qualified to translate medical jargon into language that patients can understand and use to make informed treatment decisions. If this communication were not possible, then morality would not be an informal

¹¹¹In an email that I received from Gert on 19 March 2003, Gert answered a concern I had with the vagueness of his discussion of “significant groups.” Gert responded, “The only point of using a significant group is deciding whether to accept a reason as adequate when you have doubts whether that reason counts as adequate for a given action.” When I asked Gert if one physician advising on treatment options connoted a significant group, he said “Yes.” If the doctor advised of morally questionable treatment options given the facts of a particular case, then that physician would presumably not be a significant group. This is why second opinions are sought; people naturally looks to get a qualified significant group involved.

¹¹² Naturally, many patients become fully informed about their particular maladies through research based on their personal interest in their health. However, much of this knowledge is gained through communications with medical professionals, in addition to independent research.

public system, since all moral agents would not be able to understand what morality requires, prohibits, encourages and allows.

Applying the two-step procedure does not help with the problem comparing weakly justifiable alternatives. All Gert's decision procedure shows is that different alternatives are weakly justifiable. This example highlights why I think Gert needs to explain what makes competing reasons more or less adequate given the ubiquitous fact of disagreement in controversial cases. Gert does provide some indication of his view on these issues in theoretical works, but again, he remains vague. For Gert, "...better or stronger reasons are those that involve avoiding the greater harms or gaining the greater benefits."¹¹³ However, Gert also states, "When rational persons disagree [about the relative strength of reasons] I do not count either reason as stronger than the other...."¹¹⁴ And then a few lines later, Gert states that, "reasons can be ranked by determining which irrational acts the reason can make rational.... A stronger reason will be adequate for more serious irrational acts than a weaker reason."¹¹⁵ According to these statements, we cannot tell whether those who consider, e.g., Mrs. R's consent to be valid and those who do not are supported by stronger reasons. On the one hand, the harms to the wife seem more significant to most moral agents (according to Gert), so that decision is supported by stronger reasons. On the other hand, since there is disagreement, both telling the wife and not telling her are supported by equally strong reasons, since weakly justifiable alternatives are supported by equally strong reasons.

The statement, "When rational persons disagree [about the relative strength of reasons] I do not count either reason as stronger than the other...." strikes me as false. The other two quotes in the last paragraph straightforwardly relate the strength of reasons to facts. This quote relates

¹¹³ MNJ, p 77.

¹¹⁴ MNJ, p 77.

¹¹⁵ MNJ, p 77-78.

the strength of reasons to the conclusions of moral agents. Even if moral agents disagree, the reasons supporting each alternative might be stronger or weaker depending on more accurate assessments of the harms and benefits at stake and the irrational actions that those reasons make irrational. Ultimately I think Gert is being sloppy with his language in this last quote. It would make more sense in light of the other quotes if he had said instead, "When rational persons disagree [about the relative strength of reasons], it is not apparent to rational persons that reasons supporting one alternative are stronger than the reasons supporting another alternative. In those cases, I do not consider, and we cannot conclusively tell, which reason is stronger." Gert's fallback position on decisions where informed moral agents disagree on the relative strength of reasons can be found in his recent "Reply to Kettner," which supports my conclusion that Gert's falls back on democratic methods for adjudicating controversial cases. Here Gert states, in response to Kettner's desire for consensus on controversial issues, "

When disagreements cannot be resolved, then it is morally acceptable to reach a decision by voting and acting in accordance with the will of the majority. If the moral framework [such as would be the case in a discussion of a medical ethics case] sets the limits of the discussion, and the participants have determined all of the relevant facts, then the decision reached by the majority will be morally acceptable.¹¹⁶

By "morally acceptable" Gert does not mean that the majority decision is necessarily a better alternative supported by stronger (more adequate) reasons. He only says that it is an acceptable to settle weakly justifiable issues that way when people disagree and a decision must be made, assuming absence of a law or explicit policy that decides the matter. This is a weak position for Gert to take, but one that he thinks that moral agents have to accept given their fallibility and epistemic limitations, particularly in controversial cases.

Kettner shares my concern that Gert perhaps does not go far enough in explaining how to assess weakly justifiable alternatives in controversial cases. He asks regarding Gert's theory,

¹¹⁶ Bernard Gert, "Reply to Kettner" in *Rationality, Rules, and Ideals: Critical Essays on Bernard Gert's Moral Theory*, op. cit., p 265.

“Why are good reasons indexed to groups of rational evaluators?”¹¹⁷ As a proponent of discourse ethics, Kettner’s point is to show that Gert’s discussion of the relationship between “adequate reasons” and “significant group” makes his theory sympathetic with discourse ethics but lacks other important features of discourse ethics that he thinks Gert’s theory needs, such as a rich account of what a “significant group” consists in. For Kettner, if Gert would fill out what he means by “significant group” then assessing weakly justifiable alternatives would be more fruitful and a desirable consensus would more often be achieved. Gert’s response to Kettner is that achieving consensus on controversial issues is usually untenable, since moral theory cannot be used to resolve all moral disagreements, such as the scope of morality and the different ways moral agents rank the harms and benefits at stake. For Gert, limiting disagreement is possible but eliminating it is impossible. For Gert, a majority vote on controversial issues is an acceptable method for deciding weakly justifiable controversies when decisions *must* be made and time and knowledge are limited.

Another criticism I offer concerns Gert’s discussion of the relationship between universal and particular moral rules, which includes professional moral rules such as “Obtain valid consent from patients before administering treatments.” For Gert, to say the moral rules are universal means that they “apply to all moral agents” irrespective of time, place, and culture.¹¹⁸ Regarding particular moral rules, which include professional moral rules, he says,

But even particular moral rules share the most important sense of universality of the general moral rules in that they apply to those who know the rules and can guide their action by them. Both general and particular moral rules, unlike almost all other rules, apply to all those who know them and can guide their actions accordingly. For the general moral rules, that includes all rational persons.¹¹⁹

¹¹⁷ Matthias Kettner, “Gert’s Moral Theory and Discourse Ethics,” in *Rationality, Rules, and Ideals: Critical Essays on Bernard Gert’s Moral Theory*, op. cit., p 36.

¹¹⁸ MNJ, p 114.

¹¹⁹ MNM, p 114-115.

For Gert, every rational moral agent wants to avoid the harms proscribed by the universal moral rules, like being killed. In a society that has guns, everyone knows that killing other people with guns is wrong unless it is adequately justifiable. Thus for Gert, all moral agents, at least implicitly, know the general moral rules and are responsible for obeying them. All moral agents in certain social and temporal contexts know many particular moral rules and are responsible for obeying *them*.

The point of this criticism is to show that it is not clear that Gert's distinction between universal and particular moral rules holds up. Like Kant, Gert's morality is built around rules that are universalizable. One of the criticisms of Kant's theory is that all moral rules, "maxims" for Kant, can be made categorical, i.e., universalizable, if the maxims are phrased in just the right way. Consider the particular moral rule, "Don't kill people with guns unless it is adequately justifiable." This particular moral rule (maxim), it seems, is universalizable. It is always the case for every moral agent that if they are in a place and time where guns exist, then it is morally prohibited to kill other people with guns without adequate justification. This rule is universalizable. But if this is true, then all particular moral rules collapse into universal moral rules. These results make the number of universal moral rules potentially limitless. The following would qualify as a universal moral rule. If you are physician and your patients are suffering from severe pain, then if the only effective pain relief available is aspirin, you have a duty to provide aspirin to these patients. If you are a homeowner and property taxes are assessed, then you are morally required to pay them.

For Gert, I think the issue of particular moral rules collapsing into universal moral rules is resolved on two fronts. First, Gert is more concerned with empirical facts when articulating the distinction between universal and particular moral rules. For example, it is an empirical fact that moral agents living during Plato's time had no knowledge of guns. Hence, it was empirically impossible for moral agents at that time to understand what guns are and that killing people with guns without adequate justification is morally prohibited. The view that particular moral rules

collapse into a long list of universal moral rules takes a conditional perspective, such that *if* all moral agents knew about guns, *then* it would universally be the case that killing others with guns without adequate justification is morally prohibited. Gert views this issue from the perspective of what moral agents could have actually known, not what they could have known *if*. This explains why, for Gert, the list of moral rules is short and very general. In another passage, Gert says, "Thus the universality of the general moral rules requires that the rules must be such that rational persons in every society at any time in history might have acted upon them or broken them."¹²⁰ Gert is not interested in what people would be expected to do if they knew certain facts, but in the facts they are morally responsible for knowing given the context they are in.

Secondly, and I am speculating as to what Gert would say, I think Gert would view his way of describing the distinction between universal and particular moral rules as a more efficient way do moral work. Ten moral rules are easier to learn and apply to concrete cases. With only ten rules it easy to recognize in short order those decisions that must be morally justifiable. A general moral rule, as Gert says, "is a convenient way of talking about those general kinds of actions that are morally required and prohibited, for example, keeping promises and killing."¹²¹ Gert does not think his list is complete. Of the list of ten he says, "Undoubtedly other rules could be added."¹²²

Is Gert Faithful to his Decision Procedure?

I close this chapter by considering whether Gert has remained faithful to this two-step decision procedure in analyzing these four concrete cases. Does Gert follow an implicit or explicit pattern of analysis? Does Gert use the decision procedure he argues for in his theoretical work in his actual analysis of concrete cases?

¹²⁰ MNJ, p 111.

¹²¹ MNJ, p 109.

¹²² MNJ, p 111.

Gert consistently proposes and defends an explicit pattern for assessing proposed violations of moral rules. However, I have never found anywhere in his corpus where he argues that this procedure must be followed explicitly. He argues that moral agents employing the common moral system usually follow this pattern implicitly. That pattern is, first, to discover the morally relevant facts; Gert provides ten questions to help moral agents isolate these facts in complex cases where a guide is needed and intuitions are not firm. Second, the morally decisive issue, for Gert, is to estimate the consequences of publicly allowing the moral rule violation and of not publicly allowing it. In other words, what would probably occur if everyone all moral agents knew that they were permitted or not permitted to violate the moral rule in the case under consideration and all other cases like it? Gert describes this procedure in many places.¹²³

When analyzing these four medical ethics cases, Gert does not explicitly follow his decision procedure like a checklist. For example, he does not explicitly walk through answers to questions in his list of ten questions for teasing out morally relevant facts that are relevant to each particular case. And Gert does not always explicitly ask the morally decisive question of each case before pronouncing his judgment on what he views as the appropriate morally justifiable decision. This is not a liability to Gert. He says, "We want to make the moral system explicit so it can be used by people when they are confronted with new, difficult, or controversial moral decisions."¹²⁴ This quote suggests that Gert's modest goal is to make his description of common morality and the two-step decision procedure available to moral agents when moral decisions are novel and complicated. This quote implies that many moral decisions are such that using a decision procedure explicitly is not necessary. Gert says, "The existence of common morality is shown by the widespread agreement on most moral matters."¹²⁵ In most moral matters using an

¹²³BRF 231-232; MNJ, p 236-237; CM, p 48-63; RRI, p 11; "Morality, Moral Theory, and Applied and Professional Ethics," *op. cit.*, p 16-18. Gert discusses this procedure in other places too.

¹²⁴BRF, p 16.

¹²⁵BRF, p 15-16. In an email sent to Gert in March 2003, I raised the issue of whether he thought the two-step procedure is actually followed implicitly by moral agents or that it should be used explicitly. Gert's March 19th reply

explicit decision procedure is unnecessary. Moral agents make actual decisions the way they use their native language.

Gert does not walk through each of his ten questions for isolating morally relevant facts in each of these four cases because they are presumably not *so* complex that a step by step decision procedure is needed to frame very complex situations.¹²⁶ The facts are pretty obvious to the reader from the case itself. If these cases had been long and cluttered by many pages of complicated facts and several alternative but disagreeable courses of action were available, then explicitly working through the ten questions explicitly would be an effective tool for weeding out irrelevant from relevant facts. Analogously, if a long and complicated sentence is hard to understand, it may be necessary to consult the rules of grammar to work out the explicit meaning of a sentence.

Regarding the morally decisive second step in the two-step procedure, Gert is more consistently and explicitly interested in what all, most, some, a few, or no informed moral agents would publicly allow. Of these four cases, Gert is most ambiguous in his analysis of the case of the bisexual husband, where he claims that most persons believe that the physician should tell the wife about her husband's condition if the husband will not tell her himself. Here Gert uses language loosely. The implication of saying that most persons think the physician should tell the wife in this case is that most persons would publicly allow the physician to tell the wife in this case and similar cases that have the same morally relevant facts. In the other three cases, (Mrs.

was, "I think that in noncontroversial cases, moral agents do think about the matter in the same way that they think about grammar. That includes the two-step procedure. However, just as there are complex sentences in which we have to consciously think about the grammar of the sentence, so in complex moral decisions or judgments we have to consciously think about the facts and see if we would want everyone to know that they can act that way. In general, when we know all the relevant facts, (or more commonly, have a probability estimate) we do not need to go through the first step, for we already know the kind of situation, all we need do is to go through the second step, consider whether we would be willing for everyone to know that they can act in that way in that kind of situation. That should not take long in standard situations, but in controversial or difficult situations, it is the kind of reasoning that a person should take the time to go through. Some people do think in this kind of way, as shown by statements like "Would you like to see this on the front page of some newspaper." etc. This is not quite the same, but it shows the concern with publicity."

¹²⁶ The case of Mr. J is the case where I argue that Gert uses the two-step procedure most explicitly.

O, Mr. J, and Mrs. R) Gert renders a moral judgment after explicitly asking whether informed moral agents would publicly allow the decision being considered.

One of Gert's innovations in analyzing these four medical ethics cases is the insightful way he bridges the gap between the four core medical ethics concepts that permeate the doctor-patient relationship and his description of common morality. Gert integrates the concept physicians actually use with the common moral system he argues they implicitly use rather than proposing a revolutionary change in the way they conceptualize medical moral problems.

Combining universal moral rules with the facts of time, place, and culture makes it possible to derive particular moral rules. Professional moral rules are a certain type of particular moral rules applicable to the medical profession specifically. These professional moral rules are also logically grounded in the universal moral rules. The concepts of competence, informed consent, confidentiality, and paternalism are clearly related to the duties of medical professionals, which can subsequently be framed in the form of professional moral rules that are logically grounded in the universal moral rules. Moral agents implicitly know that medical professionals who forsake their duties to apply these four core medical ethics in morally acceptable ways normally cause one or more harms that all moral agents want to avoid. Causing these harms is morally required or permitted only when justifiable according to the two-step procedure.

In each of the four cases I analyzed in this chapter, physicians and other moral agents are confronted with the need to decide whether or not to act in ways that violate universal moral rules. The core medical ethics concepts make it possible to frame these decisions according to morally acceptable methods of medical practice, obeying related professional moral rules and the associated universal moral rules. Gert faithfully assesses the justifiability of violating the moral rules in these four cases by considering whether informed moral agents would publicly allow those proposed violations.

In analyzing each of these four cases, Gert does not always explicitly articulate the relationship between the medical ethics principle being violated and the universal moral rules

being violated. Gert discusses these relationships, such as the relationship between the need to obtain valid consent and the universal moral rule prohibiting unjustifiable deception, in other chapters devoted to cashing out the logical relationships between the four core medical ethics principles and the moral rules. When he analyzes these cases, he takes it as understood that the reader is aware of the logical relationship between the medical ethics concepts he thinks are fundamental to medical ethics and the universal moral rules, and that violating these four medical ethics principles always violates universal moral rules too. Gert does articulate these logical relationships over and over again in his analysis of each case.

Of the four cases that I reviewed and assessed, Gert makes the most explicit use of the two-step procedure in the case of Mr. J. Before analyzing the case of Mr. J., Gert says, "The following case illustrates a much more common type of paternalism, it also provides an excellent example of the value of using all of the morally relevant features and the two-step procedure that are essential to moral reasoning."¹²⁷ The text of Gert's analysis of this particular case follows the two-step procedure more rigorously, although he does it tacitly without making it seem like he is plodding through a checklist. I restated the moral rules and the two-step procedure up front so that it would be easier to identify how Gert faithfully applies the two-step procedure in each subsequent case

I am not sure why Gert thinks the case of Mr. J provides a special example of the value of using all of the morally relevant features and the two-step procedure. I see no reason why Gert could not have walked through the procedure just as explicitly in the other three cases I reviewed. He does not. A reasonable explanation for Gert's analytic pattern is that the alternatives (chastising and scolding versus deceiving) provide a good opportunity for illustrating why a publicity requirement is needed to overcome alternatives that seem *prima facie* to be better alternatives, but are not alternatives that fully informed impartial moral agents would publicly

¹²⁷ BRF, p 243.

allow. Perhaps for Gert the other three cases are not as controversial such that he believes that explicit step-by-step use of the two-step procedure is necessary.

Finally, I think it is worth mentioning that Gert does not feel compelled to provide analogies in each case to clarify the conclusions that he thinks his decision procedure provides. Only in the case of Mrs. R does Gert use an analogy, the analogy of the fact-of-life of her husband's coercion to the fact-of-life of appendicitis symptoms. Analogies can be very helpful for grasping the relevant issues in concrete cases. The fact that Gert uses analogies selectively is not necessarily a significant problem. Gert uses other acceptable strategies to tease out relevant issues in other cases, such as changing the facts slightly to see what similar hypothetical cases do to our intuitions about specific cases.

Gert's Successes

I offer several reasons why Gert has been successful applying his theory to concrete medical ethics cases. Gert's decision procedure does provide a reasonably thorough set of questions as an available guide for isolating morally relevant facts embedded in complex cases where moral intuitions are not clear. This contribution is significant. A precise list of questions is useful for isolating, clarifying, and eliminating (resolvable) disagreements about morally relevant facts. If disagreement is still present in spite of a clear account of the facts, then Gert's questions help to pinpoint the reasons for disagreement. For example, Gert's questions include one to account for the possibility of medical emergencies where actions may be strongly or weakly justifiable that would be unjustifiable under normal conditions. Since Gert's questions specifically account for the fact of medical emergencies, his theory accounts for the need to make triage decisions in spite of a professional duty to treat all patients equitably and the fact that triage decisions must be made even though moral agents might disagree as to what triage decisions ought to be made in particular situations. For Gert, moral theorists such as Kant and Mill do not provide an explicit set of questions for cashing out morally relevant features in particular cases, to

their detriment.¹²⁸ Other theorists, Gert argues, merely rely on general *ceteris paribus* clauses to do the work that a precise list of questions does more effectively.¹²⁹

Gert's decision procedure has been successful because it emphasizes the importance of consequences to moral decision-making while at the same time recognizing internal and external human limitations in calculating those consequences precisely. Gert says that consequences are to be *estimated* considering factors like probability, duration, and intensity.¹³⁰ For Gert, when a violation of a moral rule is contemplated, moral agents should estimate the consequence of a violation being publicly allowed and estimate the consequences of a violation not being publicly allowed before rendering a decision. For example, in the medical profession physicians have duties both to minimize nontrivial pain and to preserve life. These facts may conflict, as is the case with providing narcotics to terminally ill cancer patients in severe pain when those narcotics will likely depress bodily functions and hasten death. In these cases consequences are crucial to making the decision, but the actual consequences may not be known. Determining the consequences of a decision is not an exact science.

Gert's moral theory has been successful in professional medical ethics since it makes a plausible case that professionals are bound by the common moral system. For Gert, morality is one, and the professions are merely one culture to which the common moral system applies. Thus, while medical professionals have certain rights and responsibilities in virtue of being medical professionals, they are nevertheless required to obey the moral rules and encouraged to fulfill the same moral ideals. When medical professionals are considering violating universal moral rules, these violations must be justifiable. Professionals are not entitled to make unjustifiable exemptions from the moral requirements of the common moral system when they

¹²⁸ BRF, p 46.

¹²⁹ MNJ, p 226.

¹³⁰ These factors are reminiscent of Bentham's hedonic calculus, except that Gert ascribes more epistemic limitations to the human capacity to calculate these factors precisely in concrete cases.

execute their professional duties, simply because they are professionals. Understanding this fact makes it less likely that professionals will view themselves as having privileged statuses that exempts them from the proscriptions of the common moral system.

Lastly, Gert's decision procedure acknowledges the fact of disagreement, some of it irresolvable. This acknowledgement has positive results. It liberates medical and military professionals. Professionals who disagree about courses of action in complex and chaotic cases and who accept the fact of disagreement are less likely to view those with opposing views as ignorant, stupid, or necessarily morally wrong. Accepting disagreement facilitates compromise, much like you might find on a decision making body that accepts consensus and compromise as a feature of corporate life. Taking a modest approach to what moral theory can achieve in controversial cases can rehabilitate the respectability of moral theory for its users.

The Limitations of Case Analysis

Gert's conscientious application of moral theory to concrete cases confirms his view that applied ethics is not, nor will ever be, an exact science. I agree with Gert on this point and would reinforce it by making some observations about the limitations of ethical case analyses that support his view.¹³¹ When analyzing a case, it is apparent that no case description is ever complete.¹³² Each account omits some facts and includes others. It is important when analyzing a case to suspend quick moral judgment and to assume that many details are probably missing from the description provided.¹³³ For example, each of Gert's case descriptions I discuss in this

¹³¹ Robert Baum has an excellent discussion of the limits of ethical case analysis in the introduction of his *Ethical Problems in Engineering*, 2nd Edition, Vol. 2, Edited by Robert J. Baum, Troy, New York: The Center for the Study of the Human Dimensions of Science and Technology, Rensselaer Polytechnic Institute, 1980, p 1-5.

¹³² This statement is empirically confirmed in the practice of law. Depositions are legal fact gathering processes. In relatively simple legal cases, these depositions can run into the thousands of pages. In more complex legal cases like the Enron scandal, these depositions can fill a large trailer.

¹³³ There is nothing necessarily wrong with acknowledging that case accounts are incomplete. Most professional have to make moral decisions in the face of incomplete or rapidly changing data on a regular basis. This fact is just one of the burdens of being a professional with decision making responsibility,

chapter is very short. Many other morally relevant facts are probably missing. These facts might impact the moral judgments that professionals would make if they had additional information. Written cases that appear simple often provide very limited accounts of morally relevant facts, lacking the sort of rich factual detail that characterizes most true-to-life moral quandaries.

It is also important to realize that, while having a reasonably thorough account of the facts is important for rendering a competent moral judgment, as facts multiply moral decisions often become more difficult.¹³⁴ For example, knowing an additional fact, namely, that a patient is a Jehovah's Witness, can greatly complicate decision-making on treatment options for physicians in what would otherwise be a routine treatment protocol involving transfusions of blood products. So, while professionals certainly want as many morally relevant facts as possible, the addition of morally relevant facts may have the paradoxical result of complicating the moral decision process while providing needed information to make a more informed and justifiable moral judgment. If time is very limited, then moral agents in professional contexts must learn to live with moral ambiguity in making difficult moral choices in complex cases.

Next, while it may be possible to gather a reasonably comprehensive description of a case, it is likely that the actors in the case, especially those actors who are morally responsible for moral judgments were, not privy to all of these important morally relevant facts when they acted. The presence of epistemic limitations is not hard to understand. For example, during the plague years in medieval Europe some physicians wore masks thinking that the lethal contagions were airborne. To criticize medieval physicians for wearing masks in light of contemporary knowledge about how fleas on certain black rats transmitted the plague to humans would demonstrate a lack of appreciation for the limited facts available to medieval physicians at that

though it does not eliminate the need to gather as many relevant facts as possible given the circumstance before making a moral decision.

¹³⁴ A separate but interesting issue is whether a complete description of a case is even possible. Case descriptions may only be relatively complete, i.e., more complete than some accounts, less complete than

time. Professionals today have analogously similar epistemic limitations. A physician may prescribe an otherwise effective medicine to a patient that the physician could not reasonably have known would cause a dangerous allergic reaction in that patient. Gert understands how relevant these limitations are to assessing the judgments of moral actors in a case, and he eschews philosophers who think they can take a God's-eye-view and pronounce definitive moral judgments about moral problems. Gert states,

However, the infallibility of people is often assumed by philosophers when they present moral problems for discussion. They present an action, usually a violation of a moral rule, together with all of its consequences as if everyone involved knew all of the consequences of that action. This is one reason why they often arrive at such counterintuitive results.¹³⁵

Case descriptions are also limited in that they often do not adequately communicate important facts about situations as they were experienced, such as the stress level, time limits, epistemic limits, and institutional pressures on the actors. These factors may excuse actors from moral blame for the harms they cause. For example, imagine that in a recent war, two vehicles are approaching an allied checkpoint at high speed. The armed guards at the checkpoint frantically motion the vehicles to stop. When the vehicles refuse to stop, the guards open fire on the vehicles, killing one and injuring the others in both vehicles. Unbeknownst to the guards, a family is trying to escape from paramilitary enemy troops in the latter vehicle who have been ruthlessly intimidating local citizens through torture and mutilation. When the vehicles finally stop in response to the guards' gunfire, the paramilitaries in the rear vehicle who are still alive get out of their vehicle and proceed to shoot the family members who are still alive and trying to escape. The checkpoint guards then shoot the paramilitary troops. In this situation all the parties were clearly acting under extreme duress; the guards have epistemic limitations as to the intentions of the passengers in the vehicles. Suppose that this case is complicated by the morally

others. Baum states that "...real-life situations are inevitably much richer and infinitely more complex than any written account can convey."

¹³⁵ MNJ, p 35.

relevant fact that car bombers have recently engaged in suicide attacks at allied checkpoints. In this environment the guards at the checkpoint could reasonably expect that both vehicles intend them lethal harm. These checkpoint troops had no way of knowing that they would be injuring, perhaps killing several innocent moral agents who were trying to escape what would most certainly have been torture and mutilation. They reasonably assumed that the persons in both vehicles had violent intentions.

For Gert, impartial moral agents employing the common moral system implicitly would publicly accept the actions of the checkpoint guards in this and relevantly similar situations. The consequences of not using lethal force are potentially grave and the guards' inferences about the likely intentions of the passengers in the vehicles are reasonable. Though the guards' actions had tragic consequences, their actions were at least weakly justifiable, certainly excusable under those circumstances.

In situations like these, moral agents have to make decisions in spite of epistemic limitations and other stressors, and their decisions can have unintended consequences. An effective moral decision making guide should account for these limitations and support making judgments when necessary in the face of limited facts, high stress, limited time, and other contextual and institutional pressures. Gert believes that his description of common morality and his moral decision procedure takes these complex factors into account.¹³⁶

Another limitation of case descriptions is the fact that they generally tend to overtly or subtly emphasize the importance of some facts over others. Each case is only one possible description of a situation. An environmentalist working for Greenpeace and a corporate representative both giving accounts of a case of alleged corporate pollution are likely to describe that case very differently. The environmentalist may emphasize the effects of the pollution on a

¹³⁶ MNJ, p 228. On this page Gert argues that, of actual, intended foreseen, and foreseeable consequences, "foreseen and foreseeable consequences are most relevant" to a moral decision. Foreseeable consequences are determined by the knowledge and intelligence of the agent. They are consequences that the agent, given her knowledge and intelligence, is expected to foresee.

certain wildlife species while the corporate representative may emphasize the corporation's compliance with all existing laws.¹³⁷ The cases that take many of these factors into account are naturally much longer descriptions, but they are also more factually correct.

Another limitation of cases is that, even if different readers agree on the facts of a particular case, readers may interpret these facts differently. The environmentalist and the corporate representative may agree on the amount of a certain pollutant being discharged into a local stream but disagree on whether they think the amounts are excessive or not. Different parties may also disagree on the long-term consequences of the pollution, such as the effect of the contaminants on ground water or the ability of the natural environment to neutralize the contaminants.

Acknowledging the variety of possible accounts of the same case suggests that case analysts should have an attitude of humility in making moral decisions based on only one or two accounts of a particular case. According to Baum, moral judgment should be conditional. "Analyses...should be carried out in the conditional sense that *if* events in fact did occur exactly as described [in the case description], then the right ethical decisions were or were not made."¹³⁸ In cases where professionals have yet to make a decision, the humble attitude would be that, given the facts that we know about this case, the right course of action, or the morally permissible alternatives for action seem to be X, or X or Y, etc.... It is always prudent, time permitting, to consider what facts are missing from a case description that might have an impact on the moral decision.

¹³⁷ An example emphasizing certain morally relevant facts over other is found in the current debate over limited punitive damages in medical liability lawsuits. Physician advocates cite the harm to patients and physicians resulting from prohibitively high increases in medical liability insurance caused by unlimited punitive damages in medical lawsuits. The trial lawyers association emphasizes the right of patients harmed by medical incompetence to substantial compensation for irreparable harms caused by medical incompetence and the deterrent force of continuing this practice.

¹³⁸ Robert J. Baum, editor, *Ethical Problems in Engineering*, 2nd edition, Vol. 2, Troy, New York: Center for the Study of the Human Dimensions of Science and Technology, 1980, p 1.

Another limitation of cases is that moral responsibility rarely belongs with only one party, but rather is usually diffused in many individuals and groups with shared or competing interests. Thus one goal of analyzing complex cases should not necessarily be to find one person to blame, but to properly distribute moral responsibility properly to involved parties. A corporation that pollutes a stream may be morally responsible for polluting, but that responsibility probably diffused among different employees in that corporation. In a case of corporate pollution, the government may share responsibility if it has written an ambiguous antipollution law that a corporation interprets for its own interest.

Explaining the limitations of case descriptions helps to guard moral agents, including professionals, against forming expectations that are too high concerning what case analysis can accomplish without undermining the benefits of case analysis entirely. Making difficult moral decisions in complex cases is a fact of much professional life. While understanding morally relevant facts of particular cases is crucial to moral decisions in those cases, understanding the facts about the limitations of case analysis in general is crucial to forming realistic expectations about what case analysis can accomplish. Gert recognizes the limitations of case analysis but is not deterred by this fact in arguing that moral agents employ common morality as he describes it in making moral decisions in concrete cases.

Casuistry and Gert

To Gert, casuistry dovetails nicely with his description of the common moral system and the two-step decision procedure; it complements his description of the common moral system even though casuistry is not an alternative moral system. For Gert however, casuistry is insufficient by itself because it has "no concept comparable to a moral rule."¹³⁹

Casuistry is a moral decision methodology for resolving moral dilemmas in concrete cases. It has experienced a revival in recent years, chiefly in response to the work of Johnsen and

¹³⁹ BRF, p 218.

Toulmin.¹⁴⁰ Casuistry resolves cases by analyzing the cases themselves rather than analyzing cases by using a particular moral theory to guide the analysis.

According to Gert, casuistry shares some of his views on concrete case resolution. Casuistry stresses the fundamental importance of empirical work, i.e., cashing out the unique morally relevant facts in each case. Similarly, casuistry values other factors Gert thinks are important, such as the harms caused, avoided, and prevented. Casuistry considers the beliefs and desires of the agents involved to be morally relevant. Casuistry takes contextual factors into account such as emergencies, duress, time constraints, epistemic limitations, and other potential excusers from moral responsibility. And casuistry is concerned with situationally relevant factors such as whether the moral actor has a professional duty in a particular situation. Each of the ten questions that Gert provides for isolating morally relevant facts in particular cases are questions that casuists could employ and most likely would consider useful for doing case analyses.

Casuistry also shares Gert's view that moral discourse has limitations. Casuists acknowledge the fact of disagreement, e.g., that moral agents may disagree about what facts are relevant and how to balance the harms and benefits at stake. Casuists also acknowledge that taking the perspective of the ideal observer is impossible; all people are fallible and vulnerable.

But for Gert, without the systematizing and integrating function of the common moral system embodied in universal moral rules, casuistry generates *ad hoc* solutions to moral problems. Casuistry is optimally effective method only when it is subsumed under and bracketed by universal moral rules and ideals, moral virtues, and the important concepts of impartially, rationality, and publicity. Casuists operating without the constraints imposed by the common moral system may reach decisions in cases that no impartial moral agents would publicly allow.

¹⁴⁰ For a comprehensive history of casuistry and a defense of the casuistic method, see Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning*, Berkeley, University of California Press, 1988.

Gert agrees with contemporary casuists, most notably Johnson and Toulmin, that moral obligations in specific cases are not *derived* from moral principles. However, for Gert casuists go too far thinking that this conclusion undermines the efficacy and the truth of universal moral rules. For Gert, the universal moral rules provide limits within which to assess action alternatives and to limit disagreement in specific cases. For Gert, although moral theory cannot do better than this, Gert, unlike die-hard casuists, does not think this limitation is a terminal problem for moral theory. The limitation is only that, a limit.¹⁴¹

For Gert, casuistry has benefits. Casuistry is effective since comparing the case at hand to other similar cases elucidates morally relevant facts in a case. Comparing a case to similar cases helps to raise detailed facts to the surface that impact the decision such as the patient's age, religious background, legal considerations, advanced directives, and finer details of a patient's malady. These factors are crucial for making informed moral decisions in cases where grave consequences are at stake, such as removing a person from a respirator or honoring a "do not resuscitate" order.

For Gert, if casuistry is appropriately bracketed by a plausible description of the common moral system, it can be useful for clarifying whether an action is one that impartial moral agents would all publicly allow, not publicly allow, or have disagreements about. If impartial moral agents do disagree, casuistry can help to clarify the level and intensity of disagreement, isolate the source of disagreement, and help to ascertain whether the disagreement is resolvable or not.

One reason Gert thinks casuistry has gained in popularity in recent years is that casuists are not committed to a particular moral theory when using the casuistic method. For Gert, this flexibility gives casuistry an edge over the standard moral theories in the halls of professional

¹⁴¹ In Albert Johnson and Stephen Toulmin's *The Abuse of Casuistry: A History of Moral Reasoning*, Berkeley: University of California Press, 1988, p 23-25, the authors argue that moral theory (which would include Gert) is handicapped in practical moral problems by being idealized, atemporal, and necessary, when practical moral problems are always by contrast concrete, temporal, and presumptive. Gert would disagree with this polarization that allegedly renders moral theory totally ineffective at resolving moral

practice. However, this point highlights a similarity Gert sees between casuists and his theory, but which casuists fail to interpret that way. For Gert, moral agents employ the common moral system the way most people implicitly use the grammatical system. To Gert, casuists are implicitly using the common moral system he describes, albeit with different levels of effectiveness and consistency, when applying their method. Gert states,

Although it seems to be against moral systems, casuistry has the appeal that it does because everyone implicitly uses some moral system; we [Gert, Culver, and Clouser] think it is the moral system we have described. We do not consider casuistry as an alternative account of moral reasoning, rather we regard it as emphasizing that morality is not a deductive system in which one simply applies absolutely clear rules to absolutely clear cases in order to determine the correct course of action.¹⁴²

To Gert, his analysis of concrete cases is casuistic but in a way that is explicitly guided by the common moral system that Gert says other casuists implicitly use with varying levels of effectiveness.

The Need for Policy

Making moral decisions in the professions can be complex and chaotic. For Gert, the diversity of controversial cases medical professionals encounter underscores the need for policies to standardize many moral decisions in medicine. Even in cases where there is strong moral disagreement, it is beneficial to have policies in place to ensure uniform treatment in particular cases and to set consistent expectations for patients and physicians. Without these policies, it will be a matter of chance what individual decisions are made in particular cases for particular patients. In the case of the bisexual man, a policy on disclosing confidential information for HIV positive patients is a wise move, even if some moral agents disagree with the policy. At least patients and physicians will know what to expect in these cases. Policies are helpful in a myriad of cases. If a young teenager tells her doctor that she wants to have an abortion, it clarifies

problems. Gert attempts to preserve the virtues of casuistry while arguing for a useful practical role for moral theory.

¹⁴² BRF, p 219.

expectations and preserves the doctor-patient relationship to have a policy (or a law) in place that parental notification is required or not.¹⁴³

Gert also argues that the importance and usefulness of policies does not entail that every moral decision a physician makes should be explicitly spelled out in intricate rules. If physicians do not have some latitude for exercising moral judgment in particular cases, then professionals cease to be professionals and become bureaucrats. If a physician believes that a parent will become abusive at finding out that her teenage daughter is pregnant and wants an abortion, then physicians should have the latitude to exercise judgment when unique morally relevant facts dictate.¹⁴⁴

Finally, Gert argues that policies are crucial in the medical profession because the formation of these policies is usually preceded by fruitful dialog by policy makers. This dialog makes policy makers better informed of the moral issues at stake and raises issues, alternatives, and facts that individuals probably did not previously consider. This dialog also reveals that informed moral agents can legitimately disagree without compromising their moral integrity. For Gert, policy formation is "in accord with the common moral system."¹⁴⁵

In the next chapter I apply Gert's description of the common moral system and two-step procedure to a few select professional military ethics cases. I will evaluate whether the same relationship holds between professional moral rules in American professional military ethics and the universal moral rules as with professional medical ethics and these same moral rules. I will see if applying Gert's procedure to military cases can help military professionals frame and assess military ethics cases and suggest alternative courses of action that impartial moral agents can publicly allow.

¹⁴³ BRF, p 44.

¹⁴⁴ BRF, p 45.

¹⁴⁵ BRF, p 45.

CHAPTER 5

GERT'S MORAL THEORY AND AMERICAN PROFESSIONAL MILITARY ETHICS

This chapter investigates whether Gert's description of the common moral system, particularly his two-step decision procedure, provides a more useful moral framework and better conceptual tools than other major ethical theories to help American military professionals in the field assess a moral decision and determine the morally acceptable alternatives available to them. To accomplish this goal, I will analyze five concrete military cases using Gert's decision procedure, assess how effectively his procedure frames the moral issues at stake, and assess how well his procedure cashes out the morally acceptable options available to those actors with moral decision making responsibility in a particular situation. As with medical ethics, effectively passing the usefulness test in concrete military cases will show that Gert's description of common morality is, "systematic, accessible, and usable."¹

For Gert, professions are each subcultures to which the universal common moral system applies. This is a strong claim. If this claim is true, then Gert's moral theory and decision procedure should be at least as relevant to the crucible of professional military ethics as it is to the complexities of medical ethics.

It is necessary to point out a crucial difference between this chapter and the last. In the last chapter I discussed and assessed analyses that Gert has already made using concept that he argues are fundamental. In this chapter, I use Gert's decision procedure to offer what I think his analyses of concrete military cases *would look like* if he used the two-step procedure to analyze *them* while employing fundamental concepts that I think Gert would consider to be fundamental.

¹ Bernard Gert, Charles Culver, and K. Danner Clouser, *Bioethics: A Return to Fundamentals*, New York: Oxford University Press, 1997, p 10. Hereafter when referring to this work in this chapter I will use the letters 'BRF' followed by the relevant page numbers.

Gert has not systematically applied his decision procedure to military ethics cases. This chapter will break new ground in that area.

Gert argues that in the medical profession several core ethical concepts are employed, sometimes implicitly, to frame the moral issues and stake and make moral decisions in concrete cases. Gert argues that the most important of these medical ethics concepts are *competence, informed consent, confidentiality, and paternalism*. Gert also argues that correctly defining and applying these concepts to concrete medical ethics cases exposes their logical grounding in the common moral system that everyone uses, usually implicitly, to make moral decisions and judgments. This relationship of medical ethics concepts to the common moral system, Gert thinks, makes it possible to analyze medical cases using these concepts without compromising the integrity of his view that there is one universal common moral system that applies to all moral agents at all times, places, cultures, and *professions*.

The American military profession is similar to the medical profession in that several core ethical concepts are crucial to the moral decisions that military professionals make in concrete cases. These core concepts are also grounded in the common moral system that Gert describes and which moral agents implicitly use. These concepts are *consent, competence, obedience, loyalty, military necessity, proportionality, and discrimination*. If the common moral system Gert describes is universal, there should be relationships between core military ethics concepts and the universal moral rules and ideals. Then it would be possible to use these core military ethics concepts to assess the justifiability of proposed violations of the universal moral rules in concrete military cases without compromising the integrity of Gert's argument for the universal applicability of the common moral system and the two-step decision procedure.

I will also make a few other points in this chapter in order to position this discussion in the larger context of ethical debate within the American professional military ethics literature. I will explain a few similarities and differences between medical and military ethics that affect how concrete cases are analyzed. Second, I will briefly compare and contrast Gert's theory and

decision procedure to the moral guidance provided by the official documents, and the systematic theories proposed by Fotion and Elfstrom, Axinn, Gabriel, and Hartle. Gert's theory and decision procedure would be an improvement on these other military ethical theories if they save what is good in these other theories and improve on their shortcomings. It remains to be seen whether Gert's theory can be used to accomplish these goals.

It is also necessary that I discuss the subject of moral *excuses* from the standpoint of the military profession. Military operations are conducted under such extremes of duress and hardship that many military professionals perform actions that, although they are not morally acceptable, are morally excusable. This is a tricky subject to discuss but one that is very relevant to the military profession. Some actions are done that are clearly wrong but are nevertheless tolerated or excused given the circumstances under which they are performed. Later I will analyze a case concerning this issue of moral excuses and the subject of tolerating ethical lapses under extreme conditions.

Professional military ethics is uniquely difficult in that a core function of military forces is to violate all of the first five universal moral rules in order to achieve the aims set by America's national command authorities.² This military function puts a strong justificatory burden on most of the activities that military forces engage in. Since military operations normally cause so much direct and indirect harm, strong reasons need to be provided in order to morally justify employing military forces. Much of this burden of moral justification falls on the leaders who make decisions about how and when to employ ready military forces. However, a substantial justificatory burden falls on military professionals in the field who must exercise judgment in

² In *Morality: Its Nature and Justification*, New York: Oxford University Press, 1998, p 250, Gert states, "War, justified or not, causes immense amounts of all of the evils [the harms listed in the first five moral rules]. This is true of civil wars, guerilla wars, terrorist wars, wars of independence, wars of liberation, and wars between nation-states." Hereafter when referring to this work in this chapter I will use the letters 'BRF' followed by the relevant page numbers.

deciding the appropriate means for achieving the aims set by national leadership in a morally acceptable manner.

Setting the Military Profession Apart

It is important that the reader understand a few significant differences between the military profession and the medical profession.³ These differences help to explain why the American military profession is organized the way that it is.

Unlike the medical profession, the American military profession, like most military professions, is organized so that those *members who make the decisions are not the members who do the dirty work*. Strategic and tactical planners decide on mission goals from places far removed from fighting while those members who act on these decisions are comparatively young, inexperienced, and uneducated. This arrangement is a practical necessity given the huge and exceedingly complex nature of military campaigns and the need for centralized command, communications, and logistical coordination. However this arrangement results in some military commanders losing touch with reality. The following quote from A.J.P. Taylor's book *The History of the First World War*, illustrates this danger, which can result in much unnecessary harm being caused.

On 8 November [1917], Haig's Chief-of-Staff visited the fighting zone for the first time. As his car struggled through the mud, he burst into tears, and cried: 'Good God, did we really send men to fight in that?' His companion replied: 'It's worse further up.' Haig alone was undismayed. He went on planning a renewal of the campaign in the spring.⁴

The American military profession is also unique in that its morality is more a *morality of institutions* than a morality of relationships. Physicians and nurses could perform their functions and treat the sick even if medical institutions did not exist. In contrast, military personnel are necessarily a part of armies and governments. Military personnel must make moral decisions

³ Keep in mind that these differences separate the military professions most professions, not just the medical profession. I use it as an example since medical ethics was discussed in Chapter 4.

⁴ A.J.P. Taylor, *A History of the First World War*, New York: Berkeley Publishing, 1963, p 124.

within these institutional structures, which greatly restricts their latitude for making moral decisions in the field. Although physicians and nurses are also part of accountability structures and subject to various laws and professional rules that are supported by various associations, none of these accountability structures are necessary for physicians and nurses to perform their social functions. Even within these loosely arranged medical accountability structures, physicians have the liberty to hang a shingle outside an office and practice medicine with substantial autonomy. Soldiers cannot act with this sort of autonomy and retain the designation 'military professional.' For this reason military professions are more analogous to machines within which individual soldiers, sailors, and air force personnel are the various operating parts, acting out their instructions in programmable fashion. Thousands of military professionals fill their various roles and most of them have little or no idea what the detailed aims of their civilian and high-ranking military leaders are.

The military and medical professions also have vastly different *group dynamics*. Groups of soldiers sometimes do things that they would not do as lone individuals. These actions run the spectrum from positive to negative. For example, soldiers in groups are often more heroic than they are working alone since the members of these groups do not want to appear cowardly. Also, groups of soldiers may succumb to peer pressures to perform immoral actions that they would not even consider doing alone. These immoral actions range from intimidation and looting to rape and murder. In a climate where the social constraints of civilian society are relaxed (or removed) and military personnel are given lethal weapons and put under enormous physical and psychological pressure, these temptations are ubiquitous. The potential negative consequences that can result from these group dynamics provide a strong reason why the military profession imposes an authoritarian command structure with many rules, rigorous training, and strong

discipline. Unflinching obedience of lawful orders is stressed and the concept of professional duty is strongly emphasized.⁵

Core Concepts of the American Military Profession

Core concepts that influence the moral decisions of military professionals in concrete cases are *consent, competence, obedience, loyalty, military necessity, proportionality, and discrimination*.⁶ If Gert is correct about the way moral agents implicitly employ the common moral system, then these core military ethics concepts should be logically grounded in the common moral system in a way that is similar to the way in which the core medical ethics concepts of competence, informed consent, confidentiality, and paternalism are logically grounded in the common moral system.

For Gert, morality is universal. If so, it should be possible to employ these core concepts of the military profession to assess the justifiability of proposed violations of the universal moral rules in concrete military cases without compromising the integrity of Gert's argument that the moral rules and the two-step decision procedure apply to all people, cultures, times, places, and *professions*.

⁵ The concept of duty is directly related to Gert's moral rule "Do your duty." Soldiers fill a social role and have duties to fulfill that are task specific. Fulfilling these duties is morally required as long as the moral agent fulfilling those duties does not commit unjustifiable violations of moral rules that he or she can control. Military professionals have many duties that fit into one of two categories, duties to the mission, and duties to people. Military professionals' primary duty is to complete the missions that they are assigned in a legal and moral way. Military professionals also have crucial duties to all sorts of people that constrain how they may legally and morally execute assigned missions. These duties include duties to superiors, subordinates, peers, the nation, the world, their significant others, taxpayers, and even God. Military professionals also have duties that restrict how they can treat enemy combatants, noncombatants, civilians in an enemy's country, and property. These duties are explained more fully in Chapter 2.

⁶ I discuss certain concepts in this section only briefly in order to illustrate their relationship to the universal moral rules. These concepts/principles are discussed at length in the official documents and the scholarly literature, which I provide an overview of in chapter 2. My point here is to show that concrete military ethics cases can be analyzed employing these long-accepted moral concepts without compromising the integrity of Gert's view that the common moral system and the two-step decision procedure. Conspicuously absent from this list of concepts are two concepts on which all the other concepts I mention depend. These two concepts are 'duty' and 'law.' The American military profession strongly emphasizes that military members must perform their duties in accordance with the law, which includes regulations, policies, etc.... I do not discuss these concepts here because "Do your duty" and "Obey the law" *actually are* universal moral rules. There is no reason to illustrate the relationship between these concepts and the universal moral rules and ideals.

In the context of the American military profession, using these core concepts to frame moral decisions in concrete cases has the benefit of using language that American military professionals are more familiar with. Using the explicit terminology that Gert uses to describe and justify the common moral system that everyone implicitly uses would be more confusing and less well-received than using the traditional moral language of the American military profession.

Consent

The issue of consent in the American military profession is related to the common moral system that Gert describes in the following way. American military personnel sacrifice some constitutional rights such as the right to free political speech and the right to move about and live the way they want consistent with their professional duties and the restrictions of U.S. law. Thus, American military professionals sacrifice freedoms and pleasures as a condition for professional membership. American military personnel also assume a much greater risk of suffering death, pain, and disability (mental and physical) when they consent to serve in the American military profession. All moral agents want to avoid these harms unless they are adequately justified. It is important to the moral justifiability of assuming these risks and sacrificing constitutional rights that the military professionals who assume these risks and sacrifice these rights do so voluntarily. American military professionals have professional duties to protect their nation from aggression and to use military power to further and protect American national interests, and to engage in humanitarian and peacekeeping missions that civilian leaders believe requires the special expertise of ready military forces. These professional duties involve assuming greater risk of harm in order to prevent other harms (hopefully worse harms). In other words, the society violates moral rules in making American military professionals perform hazardous duties in order to fulfill moral ideals, i.e, prevent harms and promote goods as prioritized by civilian leaders. American military professionals have no freedom to decide what their broad missions are going

to be. If a mission has a very high risk of causing much death, pain, and disability to military personnel, the military professionals are required to accept and manage these risks.⁷

Unlike the issue of consent in the medical profession, consent in the military profession does not focus on requiring permission from clients to perform professional duties. Military leaders do not normally require consent from their subordinates to morally justify their orders. If the order is legal and passed through authorized command channels, subordinates have a professional duty to obey whether, hypothetically, they would have consented or not. Some critically important missions are so dangerous that all rational subordinates would rather avoid them. In fact, volunteering for some missions might be an irrational choice.⁸ Requiring consent would be an impractical moral requirement in these situations. Subordinates do not have to be given all the relevant information regarding the actions they are ordered to take. Some psychological and physical pressure (that would be considered coercive in medical contexts) may be permitted in order to motivate subordinates to act.⁹

Instead, consent in the American military profession primarily concerns the current practice of commissioning officers and enlisting troops. The American military profession is currently an all-volunteer-force (AVF). Commissioned officers and enlisted troops serve in the military profession because they have chosen to be there. Officers have some liberty to resign their commission if they think that they can no longer support the profession's aims and the goals set by their civilian leaders. Enlisted troops consent to fulfill what amounts to a service contract

⁷ The military profession does have some latitude to assess and minimize risks of harms within their obligation to carry out certain missions, such as requiring soldiers to carry and be trained on the proper wearing of special suits designed to protect soldiers from biological or chemical attack.

⁸ Consent is sometimes solicited for dangerous missions with the promise of rewards such as extra time off, decorations, promotion, and other honors. Soldiers are also motivated to volunteer for hazardous missions by being informed of the importance of the mission to other war aims. These inducements are implicitly used to provide a compensating benefit that inclines enough military professional to volunteer for these hazardous missions. A soldier who volunteered for a hazardous mission that seems to him to have no compensating benefits would be making an irrational decision.

⁹ Note that these are two of the necessary criteria of valid consent Gert provides and which I discuss in chapter 4. These criteria clearly do not apply in the same way in the military profession.

for a certain number of years. Accepting this contract is binding for the length specified and obligates the enlistee to perform professional duties during that time with unlimited liability. When officers and enlistees join the American military profession, they sacrifice some of their constitutional rights in return for professional membership, pay, prestige, and other benefits (such as free medical care).¹⁰

The issue of consent is also related to the American military profession regarding some of the more prestigious assignments that are available within the profession. Persons who are already members of the American military profession can volunteer for special and prestigious duties assuming that they meet the specific and often demanding qualifications. Examples of groups that perform these duties are the U.S. Army Green Berets, U.S. Navy Seals, U.S. Air Force fighter pilots, and N.A.S.A. astronauts. These prestigious military duties normally do not lack for volunteers. Applicants are usually highly motivated individuals who are aware of the risks and rewards of membership in these elite groups.

The military profession is analogous to the firefighting profession. Firefighters have a professional duty to assume great risks of personal harm in order to prevent harms to people and property in exchange for some group membership, pay, and other benefits. It would be morally dubious to draft persons to be firefighters and to force them to assume these risks without their consent. If enough qualified applicants do not join the firefighting profession, there very well could be other more morally justifiable alternatives than conscripting firefighters to serve. Providing additional incentives to serve might just as easily augment the ranks of firefighters, encouraging qualified persons to join that profession. The American military profession is similar.¹¹

¹⁰ Military professionals give up some rights to political speech. They are, e.g., prohibited from engaging in political protests while in uniform.

¹¹ I do not want to say that a military draft is always morally prohibited by the common moral system. I would say that it should be a last resort in response to a very serious threat. Cashing out all of these issues

Competence

In the American military profession, competence has moral implications that it does not necessarily have in other contexts. Children who repeatedly fail a geometry exam in school are not behaving immorally in virtue of their incompetence at solving geometric proofs. Likewise, military personnel who simply cannot learn how to operate a sophisticated weapon system are not behaving immorally in virtue of their incompetence with, e.g., repairing sophisticated computer systems. However, when incompetent military leaders put subordinates in charge of people or equipment that they know or should know that they are incapable of managing, the relationship of competence to morality is clear. The risks of significant and avoidable harms are potentially so high for the society the military leader serves, the soldiers and equipment the incompetent member is responsible for, and noncombatants who may be harmed by the leader's incompetence, that the decisions of military leaders must be considered very carefully, assuming sufficient time is available for reflection. These decisions are *moral* decisions. For example, if a military commander puts an incompetent subordinate in charge of programming a missile guidance system, this decision has clear moral ramifications. The subordinate's incompetence may, e.g., cause a missile to miss its intended target and strike a residential area in enemy territory or hit friendly forces. Even if the missile explodes in a remote field, the incompetence of the leader has caused the irrecoverable waste of perhaps millions of dollars of national treasure or failed to take out a legitimate military target that will put friendly soldier under unnecessary and avoidable risk

is not my point. I only want to say that an all-volunteer-force is, *prima facie*, morally more defensible than a conscripted one.

of death, pain, and disability.¹² When leaders make decisions that increase the probability of causing these harms unnecessarily, competence and morality are always related.¹³

The relationship between competence and the common moral system that Gert describes does not concern only military leaders. Subordinates act incompetently and cause or increase the probability of causing harm listed in the first five universal moral rules when their incompetence is the result of factors like negligence and recklessness. In these situations, subordinates may not lack an ability to obey the moral rules "Do your duty" and "Obey the law," but rather lack the discipline and moral judgment to apply learned military skills appropriately to accomplish missions they have been ordered to accomplish.

When military leaders make decisions that require the coordination of competent subordinates to prevent unnecessary and avoidable harms, those leaders have to assess several morally relevant facts. Subordinates tasked with important duties should be qualified by previous training to handle tasks the leader assigns them, they should be physically and psychologically capable of performing assigned tasks, and they should be motivated to successfully carry out their orders.

Obedience

The American military profession strongly emphasizes obedience to military superiors and civilian leaders. Training in obedience is necessarily rigorous and intense. American society

¹² Sometimes factors are present that are beyond a leader's control. If a soldier is a poor missile programmer but is the best programmer available given the circumstances, then the leader may have no choice but to assign that programmer the job. However, these circumstances may also influence where the leader opts to send the missiles the programmer is assigned to program, such as to a remote but legitimate military target farther away from residential neighborhoods.

¹³ The examples I gave of the geometry exams and learning to program computers do not include the professions per se. In other professions I think the necessary relationship between competence and morality is also clear. Surgeons have a professional duty to know what they are doing or they will cause unnecessary harms. If a surgeon let an inexperienced resident perform a dangerous and tricky procedure that carried significant risks without careful supervision, the chief surgeon's leadership would be incompetent and morally unjustifiable. Likewise, judges are expected to know the case law and precedents that weigh on a legal decision. Incompetence in this area would cause much unnecessary harm.

stresses individuality; the military profession stresses conformity, service, and disciplined teamwork in pursuit of goals greater than self-fulfillment and self-expression.

Without obedience, the American military profession could not fulfill its vital social function.¹⁴ Military operations are time sensitive, complex, and hazardous endeavors that require complex coordination, training, and teamwork. Mission success and protection of friendly military forces from unjustifiable harms that all moral agents want to avoid requires immediate obedience to the directives of legitimate superiors. Obedience is also crucial for imposing moral restraints vital to protecting enemy troops and noncombatants from unnecessary harm.

Mission accomplishment and the protection of friendly forces also require coordination and teamwork within individual units. A formation of military aircraft may not be able to do their mission effectively if even one pilot disregards the directive of his lead pilot and breaks formation unilaterally. A crew operating a single aircraft may fail to fulfill its role in a larger mission if a radio operator or radar technician does not follow his aircraft commander's directives. A U.S. Navy destroyer would be in grave danger if the captain of the minesweeper working ahead of her disregarded an order to clear a safe path through a dangerous harbor near enemy territory. In a U.S. Army platoon, the unit could suffer irreparably if a soldier ordered to take a turn as a night sentry ignored his platoon commander's orders and decided to sleep instead.

Reinforcing the habit of instant obedience also has the benefit of protecting soldiers from harm in emergency situations. If a soldier hears an incoming mortar and yells, "Get down!" soldiers respond immediately, not simply because of the dangers involved, but because the habit of instant obedience has been inculcated. Similarly, if an instructor pilot senses a problem with a pilot trainee's landing approach and states "I have the aircraft" the trainee is conditioned to let go of the stick immediately. These automatic responses prevent many unnecessary deaths and

¹⁴ Analogously, the practice of medicine would disintegrate if nurses and other health care professional in relevant positions of responsibility could not be counted on to follow the instructions of their patients' physicians.

serious injuries; they also protect expensive national assets from unnecessary damage and destruction.

In the American military profession, obedience is so vital to the military function that failure to obey lawful orders is a crime. According to Article 92 of the Uniform Code of Military Justice, if a subordinate violates or fails to obey any lawful order that he has a duty to obey or is derelict in performing his duties, he may be punished by court-martial or nonjudicial punishment. The gravity of the punishment depends on the gravity of the order, the disobedient soldier's rank, and the context in which the order was disobeyed.

The functional necessity of obedience cannot be overstated. Samuel Huntington, author of the classic, *The Soldier and the State*, put it this way,

When the military man receives a legal order from an authorized superior, he does not argue, he does not hesitate, he does not substitute his own views; he obeys instantly. He is judged not by the policies he implements, but rather by the promptness and efficiency with which he carries them out.¹⁵

It is important that Huntington tempers this strong statement by stating that orders the subordinate receives are *legal orders* from duly authorized superiors. While obedience is necessary for the military profession to fulfill its function, obedience is not sufficient to fully exempt military professionals from moral responsibility for the orders that they obey. An order given by an authorized superior may still result in a war crime if it is carried out. U.S. Army Field Manual 27-10 explains this tension between instant obedience and moral responsibility for one's actions as follows.

The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character as a war crime, not does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.¹⁶

¹⁵ Samuel Huntington, *The Soldier and the State*, New York: Random House, 1957, p 62.

¹⁶ U.S. Army, Field Manual 27-10 (FM-27-10), *The Law of Land Warfare*, Washington DC: Department of the Army, 1956, p 182.

In the American military profession, obedience is grounded in the common moral system that Gert describes. The fact that obeying legal orders is a duty and failing to do so breaks the law shows that obedience is directly connected to the universal moral rules, "Do your duty" and "Obey the law." These moral rules have exceptions but they must be morally justifiable. If a soldier disobeys an order, the order must be an illegal one, or the exception must be one that fully informed moral agents would publicly allow in that case and all cases that share the same morally relevant facts.¹⁷ For example, if a superior orders that a bridge be destroyed at two in the morning and a parade consisting of hundreds of innocent civilians just happens to be marching over the bridge on that particular night at that time, it may be morally justifiable for the soldier to wait twenty minutes for the bridge to clear before destroying it.

Obedience is also related to the first five moral rules in other ways. Giving an order always denies the military professional receiving the order freedom and the pleasure that the professional would retain from keeping that freedom. Obedience is also related to the moral rules "Do not kill," "Do not disable," and "Do not cause pain" whenever military professional must follow orders that put them at risk of being killed, disabled and hurt, or put the enemy at risk of the same from carrying out those orders. Even when an order will probably result in these harms, those orders must generally be obeyed.

Normally lawful orders can be amended by wireless communications between superior and subordinate so that a commander can give feedback as anticipated circumstances change. Soldiers often lack so many morally relevant facts pertinent to how their missions coordinate with larger military operations that it is normally impossible to estimate the consequences of disobedience based only on soldiers' immediate perceptions. The presumption is usually in favor of obedience, but not always. The burden of proof for disobedience lies with the moral agent

¹⁷ Even if a soldier's rationale for disobedience is well argued, he still may be punished for his disobedience. Soldiers must accept these consequences when they disobey. It is a fact the fully informed moral agents tend to be military professionals familiar with the morally relevant facts of a situation. Other moral agents can be fully informed too non-professionals usually are not so informed.

who would disobey an order. Advanced communication technologies have made it much easier to send information and receive feedback regarding changing morally relevant facts.

Particular instances of disobedience do not necessarily cause more harm than they prevent, but the widespread practice of disobedience in the military profession greatly increases the probability of causing all of the harms described in the first five moral rules. Thus, every violation of the professional rule, "Obey superior orders" should be morally justifiable using the two-step procedure.

Loyalty

Loyalty is a dedicated attachment or affection that involves giving special consideration to a person or group. Loyalty is *prima facie* a good thing for military professionals to have. However, loyalty must be restrained by morality to be appropriately expressed. Loyalty may be given to one's family, friends, colleagues, school, religion, nation, a set of noble ideals, or even a list of moral principles.

Loyalty seems to contradict Gert's account of impartiality, since loyalty means having more concern for some at the exclusion of equal concern for everyone. However, loyalty need not conflict with *moral* impartiality. Moral impartiality is, for Gert, only possible with respect to obeying the moral rules. In contrast, preventing harm is never accomplished with moral impartiality because moral ideals are fulfilled towards particular persons or groups in a particular way.¹⁸ If two children are trapped in a burning building and one of these children is your child, saving your child first does not mean that you are not behaving with moral impartiality. Your action prevents harm; all such acts prevent harm to some at the expense of others who might also be helped at that time.¹⁹ For this reason loyalty and moral impartiality are not necessarily incompatible. Actions that express loyalty are morally permissible and should be encouraged,

¹⁸ See my section on Gert's conceptual analysis of moral impartiality in chapter 3.

¹⁹ Most moral agents would probably think you had a problem if you left your child in the burning building and saved an unknown bystander first.

provided that those acts of loyalty do not commit unjustifiable violations of universal moral rules. The person who rescues his child first from a burning building expresses loyalty without violating moral rules. In this situation, it is arguable that the parent who does not express loyalty by rescuing his child first is behaving *immorally*. The parent has a role-specific duty to his children that he or she does not have to other children.

The moral rules provide the *limits* of morally acceptable loyalty. This is an important result, since loyalty also provides a powerful motivation to act immorally. For example, a person can frame another moral agent for a murder out of loyalty to a brother who is guilty of that crime. All moral agents know that expressions of loyalty like these are nearly always morally unjustifiable. The power of loyalty as a motivator for immoral behavior is evidenced in the negative feelings people have towards whistleblowers in their organizations.²⁰ The motivational power of loyalty has been used often by evil persons to cause some of the gravest crimes in human history. In her *The Origins of Totalitarianism*, Hannah Arendt wrote, "Himmler's ingenious watchword for his SS men was 'My honor is my loyalty.'"²¹ Loyalty must be constrained by the moral rules or loyalty will be used to serve evil ends.

General Marshall had a different and I think, correct view of the proper demonstration of loyalty in the military profession. Marshall's official biographer, Dr Forrest Pogue, said of Marshall,

While he would not coddle soldiers, he would not attempt to kill their spirit. "Theirs is not to reason why—theirs but to do or die" did not fit a citizen army, he said. He believed in a discipline based on respect rather than fear; "on the effect of good example given by officers; on the intelligent comprehension by all ranks of why an order has to be and why it must be carried out; on a sense of duty, on esprit de corps."²²

²⁰ MNJ, p 257.

²¹ Hannah Arendt, "Totalitarianism," Part Three of *The Origins of Totalitarianism*, New York: Harcourt Brace and World, Inc., 1966, p 22.

²² Forrest C. Pogue, *George C. Marshall, Global Commander*, The Harmon Memorial lectures in Military History, no. 10, United States Air Force Academy, Colorado, 1968, p 18.

For Marshall, it is an empirical fact that loyalty is something that must be earned rather than coerced. While it is not always possible to take the time to sell every command decision to one's subordinates, some discussion of the reasons for one's commands and the larger aims of military missions with those who will perform these missions provides an appropriate measure of respect to other human beings who are sharing the burdens of military service during difficult times. One way to instill this appropriate loyalty in subordinates is to provide a moral justification for what they are being asked to do. To consistently expect only blind obedience will not suffice. Occasionally, soldiers need to be told that the harms they are being asked to cause will prevent worse harms or promote greater goods for their units, branch of service, nation, family, friends, way of life, and noncombatants in a hostile country. Providing these reasons provides military professionals with incentive to serve effectively and morally.

Military Necessity, Proportionality, and Discrimination

I mention these last three concepts (principles) together because they are corporately used to make moral judgments about the moral acceptability of military missions that are being considered. None of these principles alone is sufficient to morally justify a military action. Each of these principles has a long tradition in the customs and traditions of war and in the laws of war that have gradually developed since the Leiber Rules were drafted in the early 1860s.

Military actions that satisfy the principle of military necessity are those actions the "compel the submission of the enemy with the least possible expenditure of time, life, and money."²³ The goal of this principle is not only to maximize the probability of winning, but minimize the probability of losing. There are moral limitations on the use of this principle as a justification for military action. Permissible military actions have to be necessary too, but not every action that is militarily necessary is morally permissible. For example, the fact that the U.S. could win most conflicts easily by using tactical nuclear weapons with minimal loss of

²³ M. Greenspan, *The Modern Law of Land Warfare*, Berkeley: Berkeley Press, 1959, p 313-314.

American life, time, and money does not make the use of tactical nuclear weapons morally justifiable. Most fully informed moral agents now think that these weapons are a last resort. Killing enemy prisoners is another example. The fact that killing prisoners might save time, American lives, and money in a particular situation does not make killing prisoners morally justifiable. Military necessity is bracketed by law and constrained by the moral rules.

The concept of proportionality concerns the importance of consequences in evaluating the moral justifiability of military missions. A action is proportional if the estimated harms prevented or benefits gained outweigh the estimated harms that will be caused by the action. Proportionality puts restraints on excess, limiting, as Walzer puts it, "purposeless or wanton violence."²⁴ This concept is difficult to apply in concrete cases because, as so many philosophers have observed, consequences are difficult to calculate. This principle is also difficult to follow consistently. Many unnecessary harms result from putting lethal weapons in the hands of undisciplined soldiers and giving decision-making authority to incompetent military leaders. Nevertheless, proportionality is obviously morally relevant to moral decisions in the military profession. Many decisions that satisfy proportionality alone are morally unjustifiable if they do not appropriately discriminate between combatants and noncombatants.

The concept of discrimination provides a third moral restraint on the moral justifiability of military actions. According to this concept, appropriate measures should be taken to avoid causing harm to innocent civilians and their property. Causing harm to innocent civilians and property normally is not militarily necessary and normally does not satisfy the principle of proportionality. Indiscriminate military actions have little effect on eliminating an enemy's ability to fight. These actions usually waste ammunition and incite rage and determination in enemy civilian populations. Indiscriminate military actions hinder the goal of achieving a stable peace. These actions harm human beings who have not made themselves legitimate targets of

²⁴ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York: Basic Books, 1977, p 129.

military aggression by joining the enemy's military forces. Murphy puts the principle of discrimination well when he argues that "combatants may be viewed as all those in a territory or allied territory of the enemy of whom it is reasonable to believe that they are engaged in an attempt to destroy you."²⁵ Discriminating is difficult for military professionals. Even some of the food a farmer grows in enemy territory may wind up supporting soldiers trying to destroy you. Murphy tries to eliminate some of these borderline cases by arguing that combatants are those who are soldiers or support the soldier *qua* soldier, not the soldier *qua* human being.

Military operations usually violate each of Gert's first five moral rules. In the American military profession, military necessity, proportionality, and discrimination are crucial for assessing the moral justifiability of military decisions that cause harms that all moral agents want to avoid. Military actions that are unnecessary, that cause harms that are disproportionate to the harms prevented or benefits achieved, and that cause indiscriminate damage to enemy soldiers, noncombatants, and property are *prima facie* morally unjustifiable. The compensating benefits that result from these military actions do not override the moral requirement to obey the moral rules.

Summary

Consent, competence, obedience, loyalty, military necessity, proportionality, and discrimination are morally relevant to military decisions that involve actions that violate universal moral rules. These concepts can be used to form questions, the answers to which are morally relevant facts. Is this mission/action militarily necessary? Are the probable harms prevented, avoided, or the benefits gained proportional to the harms that this mission/action will probably cause? Does this mission/action appropriately discriminate between combatants and noncombatants, military and civilian property? Answers to each of these questions are morally

²⁵ Jeffrie G. Murphy, "The Killing of the Innocent," *The Monist*, No. 57, 1973, reprinted in *War, Morality, and the Military Profession*, 2nd Edition, edited by Malham M. Wakin, Boulder: Westview Press, 1986, p 347-348.

relevant facts because the answers to these questions *can* change whether a fully informed impartial moral agent (military professional with sufficient knowledge of the situation) would publicly allow the mission/action in that situation and all relevantly similar situations.

Consent, competence, obedience, loyalty, military necessity, proportionality, and discrimination are crucial to the American professional military ethic because these concepts are grounded in the common moral system that Gert describes. Insofar as these concepts are supported by law and regulations, they are directly grounded in the moral rules, "Do your duty" and "Obey the law."²⁶ However, even if law and regulations did not support these concepts, they would be morally relevant factors in the moral decisions that military professionals make. Consent is crucial since military professional assume great risks to prevent harms and promote goods. Conscriptioning persons to fulfill these ideals is morally problematic. Qualified individuals should be encouraged to serve their country rather than be forced to do so unless conscripted military service is morally justifiable using the two-step procedure. Competence is crucial to military decisions since the probable and avoidable harms caused by putting incompetent persons in charge of people and lethal equipment are grave. The need for competence illustrates the need for effective and disciplined technical and leadership training. Obedience is grounded in the common moral system because the profession would disintegrate without it and because blind obedience to superiors without the constraints the common moral system provides has been used to commit some of the most atrociously harmful actions in human history. Loyalty is grounded in the common moral system because the kind of loyalty that fully informed impartial moral agents would publicly allow is loyalty that is necessarily limited by the moral rules. Finally, military necessity, proportionality, and discrimination are concepts crucial to assessing the morally

²⁶ Bernard Gert, "Morality, Moral Theory and Applied and Professional Ethics," *Professional Ethics: A Multidisciplinary Journal*, Vol 1, No 1 & 2, Spring/Summer 1992, p 13-14.

justifiability of military decisions that involve violations of moral rules (which includes practically all military operations).²⁷

Analysis of Military Ethics Cases

Recall that, for Gert, the two-step decision procedure is not a rigid recipe that must be followed explicitly in making all controversial moral decisions that concern proposed violations of moral rules. However, the procedure is useful in cases where the moral agents involved do not have firm intuitions about what ought to be done. The procedure is a guide. In the military cases I analyze below, I use the military ethics concepts I previously discussed that are relevant to each analysis, using Gert's two-step procedure to guide my organization of the analysis. I discuss what I consider to be the morally relevant facts each case and render a moral judgment of the moral agent's actions by considering what fully informed moral agents would or would not publicly allow.

It is important for the reader to keep two things in mind in reading these analyses. Analyses of concrete cases have limitations, which I discussed in Chapter 4. Also, the American military profession is remarkably like civil society. It has doctors, lawyers, technicians, engineers, cafeteria workers, supply clerks, and personnel managers, mechanics, and accountants, just to name a few. Military personnel serving in each of these specialties wear the military uniform. Since the American military profession is so like a society, there is a huge diversity of potential military ethics cases to choose from to analyze using Gert's decision procedure. The few cases I analyze in this chapter are a miniscule representation of the possibilities for case analyses, both in breadth and depth.

²⁷ At least two of these concepts have analogous applications to medical ethics cases. For example, physicians that prescribe medicines that are unnecessary for treating patients' maladies or are prohibitively expensive when there is other alternatives are violating an analogous principle of necessity. A physician who recommended a coronary bypass to repair a single coronary artery that is only 50 percent blocked would recommend a remedy that would most likely cause harm that is disproportionate to the likely harm the bypass prevents.

Each of the ten questions that Gert proposes to isolate the morally relevant facts does not necessarily apply in every concrete case.²⁸ For example, one situation may not qualify as an emergency (question 10) or not be a situation where actions are considered that would prevent other moral agents from violating moral rules (question 6).²⁹ However, for Gert, the morally decisive second step should always be applied when making a controversial moral decision.³⁰ The two steps are restated below for the reader's review.

Step #1: What are the morally relevant features in this particular case? Answers to the following ten questions that apply to the case at hand are all morally relevant features. These questions help one determine what kind of moral rule violation a particular violation is.

1. What is the moral rule being violated?
2. What harms are being caused, avoided and/or prevented by the violation?
3. What are the relevant desires and beliefs of the person toward whom the rule is being violated?
4. Is the relationship between the person violating the rule and the persons toward whom the rule is being violated such that the former has a duty to violate moral rules with regard to the latter independent of their consent?
5. What goods (including kind, degree, probability, duration, and distribution) are being promoted by the violation?
6. Is the rule being violated toward a person in order to prevent her from violating a moral rule when the violation would be unjustifiable or weakly justifiable?
7. Is the rule being violated toward a person because he has violated a moral rule unjustifiably or with a weak justification?
8. Are there any alternative action or policies that would be preferable?
9. Is the violation being done intentionally or only knowingly?
10. Is the situation an emergency such that no person is likely to plan to be in that kind of situation?³¹

²⁸ See the last section of chapter 3 for a description of these ten questions followed by a short explanation of each one.

²⁹ BRF, p 38.

³⁰ Bernard Gert, *Common Morality*, a working draft for an upcoming book, Department of Philosophy, Dartmouth College, 2002, p 63; here Gert states, "Then the consequences of everyone knowing that this kind of violation is allowed must be estimated, and also the consequences of everyone knowing that this kind of violation is not allowed." Hereafter, all references to this work will be cited with the letters CM, followed by the relevant page numbers.

³¹ MNJ, p 227-236; CM, p 48-60; Bernard Gert, "Morality, Moral Theory and Applied and Professional Ethics," op. cit., p 17-18. In this last source question ten about emergencies is omitted and question three is broken out into two separate questions. Question nine adds the words 'voluntarily,' 'freely,' and 'negligently' to 'intentionally' and 'knowingly.'

Step #2: Estimate the consequences of everyone knowing that this kind of violation is publicly allowed and not allowed. This step can be phrased in the form of a question, "What effects would this kind of violation being publicly allowed or not publicly not allowed have?"³²

This first case I consider is a case where an Army Captain must decide what risks are justifiable to his troops in order to maximize the competence of his unit for successfully completing missions they are likely to face in the future. In this case the Captain's dilemma results from unusually harsh environmental conditions.

The Case of the U.S Army Ranger Captain

Captain A commands a U.S. Army Ranger company. His unit is conducting winter warfare training in the northwest, where a snowstorm has just swept into the training area. The unit's training includes strenuous mountain climbing under hazardous conditions. The previous day, two men were seriously injured in training accidents that resulted from the combination of severe weather and precipitous mountain terrain. Captain A is not sure if training should be temporarily halted. The injuries have been a grim shock to his men.

Captain A's unit could eventually be tasked with performing winter combat operations in rugged mountainous terrain. Captain A knows that, in order to develop combat effectiveness, it is necessary for his unit to be able to function effectively under extremely adverse conditions. It is possible that they will be given combat missions where they would have to operate in similar or worse winter and terrain conditions. Captain A also knows that this training exercise is only held annually, thus providing a rare but important opportunity to develop critical expertise.

Further accidents would be almost inevitable if training continues. Captain A is reluctant to order his men into an exercise that will almost certainly result in injuries that could be fatal. Captain A's higher headquarters, geographically far removed from the training area, has empowered him to make the decision.³³

The last line in this case frames the Captain A's dilemma. His geographically removed commander has empowered him to decide whether to exploit the adverse weather conditions to provide valuable combat effectiveness training for his troops. If Captain A's higher headquarters

³² MNJ, p 236; CM, p 62; Bernard Gert, "Morality, Moral Theory and Applied and Professional Ethics," op. cit., p 19.

³³ Adapted from a case taken from Anthony E. Hartle's, *Moral Issues in Military Decision Making*, Lawrence: University of Kansas Press, 1989, p 144-145.

had given him an order to continue the training or ordered him to curtail the training, either of these orders would have been legal orders that Captain A would have had a professional duty and a legal obligation to obey. Then the moral responsibility for the outcomes (those that were not caused by his own functional incompetence) would have been deflected to higher echelons of command.³⁴

Thus, Captain A must make this difficult moral decision alone. If he decides to continue training, serious injuries or fatalities may occur that everyone concerned wants to avoid. Captain A believes that this training is necessary to develop valuable skills his unit may need to successfully complete future missions and that these valuable skills may prevent unnecessary and avoidable harms to his troops in those future missions. However, the harms that this training prevents are impossible to accurately calculate. Captain A must decide if the probable harms this training will prevent in the future are significant enough to justify the probable harms that may be caused by the training. If Captain A decides not to train, his actions will prevent those harms that would have occurred if he had ordered his unit to train in these conditions. Curtailing training may or may not eventually result in more harms than it prevents. Failure to exploit this training opportunity could prove to be a decisive factor in mission success at a crucial future time, resulting in unnecessary harms that are listed in Gert's first five universal moral rules.³⁵ Both of Captain A's options concern his duty to weigh the risks and benefits of training with the effects the training or lack thereof will have on the combat effectiveness (competence) of his unit. Captain A's duty to the welfare of his troops and his duty to develop a highly competent, mission capable

³⁴ This statement assumes that Captain A performs the training as safely as possible according to regulations.

³⁵ MNJ, p 165. The harms that may result for curtailing training are two-pronged. The members of the unit may be harmed if they fail to obtain valuable expertise that this training provides. They could be harmed by their incompetence in dealing with harsh weather and they could be harmed if their incompetence makes them more vulnerable to enemy attack. The second prong relates the harms of incompetence to the larger mission. For example, this ranger unit could be tasked with scaling a cliff in winter conditions to destroy a surface to air missile site that is wrecking havoc on friendly air forces. If this ranger unit is incompetent to manage this mission as a result of not receiving the appropriate training, planes could be shot down that otherwise would not be. The cascading effect of this failure on broader mission goals could be significant.

combat unit are in conflict. He is loyal to both. Captain A's moral decision is difficult because the harms that will result from either decision are difficult to accurately predict.

Captain A's unit does not share Captain A's burden of responsibility. Whether Captain A orders the training to continue or curtails training until the weather clears, his troops are obligated to obey his legal orders and manage the risks of training. Unlike higher-ranking officers further up his chain of command, Captain A cannot delegate responsibility for the moral decision to lower levels.

Captain A does not require his unit's consent to continue the training or curtail it. His troops are morally required by the moral rules "Do your duty" and "Obey the law" to obey his decision. However, since Captain A's commander has given him the green light to make this training decision, it would be prudent to discuss the pros and cons of the options with leaders under him in the chain of command. Doing so will build rapport, establish consensus, and enable Captain A to more effectively know what his subordinates' concerns are. Communicating with his troops will also build loyalty between his subordinates regarding the decision that he makes. Captain A's troops most likely would appreciate being reassured that the additional risks they are asked to assume are not in vain, e.g., that the training will be instrumental to preventing and avoiding more severe harms in later engagements, harms that, according to Gert, they all want to avoid. Whether Captain A decides to train or not, it would be wise for him to explain the reasons for his decision with those in charge of smaller groups within his unit subsequent to making it. If Captain A decides to train, his unit should participate in brainstorming for ways to minimize the risks of serious injuries and fatalities in the context of exploiting the training for maximum benefit.

If Captain A decides to train, he knows (or should know) that his decision will cause predictable mental and physical discomfort in addition to those discomforts that may be classified as extreme in this situation. The members of Captain A's unit expect discomforts as a condition for membership in this elite group. These should not be harms that the members of Captain A's

unit want to avoid. In volunteering for Ranger training, they were aware that their duties would involve these sorts of harms.

It is difficult for Captain A to estimate the probability that his unit will actually have to engage in combat operations in conditions this extreme or worse in actual future combat operations. This training is analogous to the hazardous training accomplished by airborne units in the U.S. Army. Airborne units train to jump out of planes in large numbers at night at dangerously low levels. Developing this necessary expertise is only possible by actually jumping out of airplanes at night. Commanders know that airborne training causes injuries (some of them severe) and occasionally a few fatalities. Many jumpers suffer broken bones or torn ligaments. Sometimes a parachute fails to deploy and a soldier dies. These risks are considered acceptable when weighed against the greater harms that would be caused by letting incompetent troops perform missions requiring low level jumps during combat operations. However, suppose the commander had to decide whether to order jump training in high wind or during a storm. These conditions might be considered necessary for developing combat effectiveness but would cause a greater risk of serious injury and death to troops than training under more normal weather conditions. A commander ordering jump training in these conditions would have a moral decision to make that is similar to Captain A's decision. The commander would have to weigh the risks and benefits of training and determine whether these risks and benefits were proportional to the harms prevented and benefits gained in probable future combats operations under similar conditions.³⁶

Becoming a U.S. Army ranger is a prestigious duty that Army personnel volunteer for. Captain A's troops are willing volunteers. If volunteers meet the criteria for Ranger training,

³⁶ This situation is not unlike a parent making his children learn the Heimlich maneuver. There is a significant likelihood that none of the parent's children will have to use the maneuver; however, the consequences of not knowing the maneuver at a crucial time could be deadly, and they are avoidable. All moral agents would like those around them to know how to use this procedure in order to save their life if necessary.

initiates know that they must endure and successfully pass rigorous and often unpleasant training that eventually eliminates a sizable percentage of applicants. The members of Captain A's unit expect to be involved in training exercises that cause significant mental and physical discomfort. In this case, it is reasonable to infer that the adverse conditions exceed the troops' reasonable expectations concerning the training risks that are morally justifiable in order to maximize combat effectiveness. Nevertheless, the members of Captain A's do not have the liberty to decide for themselves whether or not the risks and rewards of a specific training mission make this training morally justifiable. They have a duty to obey Captain A's orders.

Some members of Captain A's unit probably think this winter mountain training is a unique challenge that they are eager to accept. They know that such training is necessary to develop combat effectiveness and they probably want to prove their metal by completing this training successfully. Other members are probably more fearful and do not share their more adventurous comrades' motivations.³⁷ Some may think the risks are unnecessary because the risks are not worth the marginal increase in unit effectiveness that this training fosters. Some members of Captain A's unit may even believe that they can develop commensurate combat effectiveness for mountain winter operations in other less hazardous ways.

Continuing the training in this case may also positively develop mental discipline in his troops. If Captain A's unit encounters future military missions where conditions are similar and his unit is unprepared, then his men may be more likely to buckle under pressure than they would be if they did complete this extreme winter training. Some members of Captain A's unit may overcome significant fears that would have caused them to lose their composure at a critical time in combat operations in similar environmental conditions. Soldiers who lose their composure

³⁷ Human beings, for Gert, rank these harms and benefits differently. This is one source of irresolvable disagreement on moral decisions. See CM, p 12-13. U.S. Army Rangers rank how they balance harms and benefits differently than middle-aged bankers do. However, even with the ranks in this unit, the members may rank the harms and benefits differently. For Gert, this fact would explain why some members of the unit are eager for the challenge this training offers, and other members sincerely hope the training is curtailed.

under extreme duress are more likely to disobey orders, kill innocent civilians, ignore injured comrades, run from a fight, and lose their ability to work as a coordinated team. If this training prevents significant amounts of these harms, that fact alone supports a decision by Captain A to train in these conditions.

If Captain A orders the training, it is significant for Gert that injuries or deaths that result from this training are not caused intentionally. The probability of injuries and the possibility of fatalities is only foreseen. Captain A does not want the members of his unit to get frostbite or be injured or killed. He would prefer that his training decision results in no injuries and no fatalities vice the normal discomforts that help to develop mental toughness, an ability to overcome fear, and the ability to carry out assigned tasks effectively in harsh weather conditions.

According to Gert, Captain A has two alternatives in this situation. He can either order the training or not. However, embedded in these two options, Captain A has some other alternatives that are morally relevant to his decision. If Captain A orders the training, he can also order that appropriate additional measures be taken to minimize the risk of harm that results from these extreme conditions. For example, can order his unit to be issued snowshoes or extra signal flares that they would normally not take along. Another possibility is that the unit might supplement their first aid kits with easy carry items that would aid in treating the unique injuries members could expect to encounter under these conditions. Or he could issue something extra but simple like battery powered socks, which would prevent a significant amount of discomfort and help the members of his unit to remain disciplined as they carry out assigned training tasks. Captain A would have to ensure that these additional measures were consistent with the preparations that this unit would be expected to make in real combat operations so that they do not form unrealistic expectations that will be dashed in combat.

In contrast, if Captain A ordered training to be curtailed, he could insist that the time not be wasted waiting for the weather to improve. He could order his unit work on other crucial

skills that need to be reinforced in order to maximize combat effectiveness and to minimize the risk of unnecessary harms in future combat operations.

According to Gert, Captain A's decision should depend on his estimation of the risks and rewards of ordering this training weighed against the risks and rewards of curtailing it. Other experienced field commanders would probably disagree with Captain A's choice. Thus, both of Captain A's options are only weakly justifiable.³⁸ Experienced field commanders will rank the risks and rewards at stake differently. A more conservative ranger would conclude that this training is not militarily necessary for future mission success and that the risks of injury and death from training are disproportionate to the possible harm prevented or benefits gained in future operations. This conservative ranger might conclude that ordering training missions similar to the one Captain A faces would demonstrate morally unacceptable disregard for the welfare of subordinates. A less conservative ranger commander could conclude that the risks of training are overridden by the benefits the training will probably provide for future combat operations. If Captain A curtails the training, a less conservative ranger would conclude that Captain A has missed a rare opportunity to learn valuable skills under harsh weather conditions, and conclude that this missed opportunity will surely result in worse harms at some later date in actual combat operations.

Since ordering the training and ordering the training to be curtailed are both weakly justifiable options, both are morally acceptable alternatives. Both options are consistent with Captain A's moral obligation to obey the law and to do his duty. Both alternatives can be reasonably interpreted as consistent with a military leaders' duty to maximize mission capability

³⁸ MNJ, p 223. When I use the phrase "experienced field commanders," I have in mind those military professionals that Gert would argue are fully informed moral agents in this case. Experienced field commanders familiar with Captain A's situation are more likely to understand the morally relevant facts that are crucial to making an informed training decision in this case. This group of fully informed moral agents can include other moral agents beside experienced field commanders, assuming that these agents are also familiar with the morally relevant facts too, perhaps through research or prior similar experiences. For example, a forest firefighter might be familiar with dangerous training scenarios to be qualified as "fully informed."

and care for the welfare of subordinates. Choosing one alternative or the other does not demonstrate incompetent leadership given the facts of this case.

Captain A is on his own. Since his leaders believe that it is best to empower him with this moral decision, it is reasonable to view their empowerment of Captain A as further evidence of the moral acceptability of both options. It is also wise for Captain A's leaders to delegate this decision to him. He is in a better position to understand the facts, such as the actual training environment and the mental and physical condition of his troops. If the training or lack of it leads to disastrous consequences that can be positively attributed to the decision that Captain A makes, higher level leadership may want to reconsider their training programs and form policies that will standardize these decisions in similar situations in the future.

Military professionals obviously face a variety of moral decisions that concern issues other than those brought on by harsh environmental conditions. More frequently the burdens of leadership in the military profession require moral decisions that must balance the values, beliefs, and preferences of individuals with divergent backgrounds with a professional obligation to maintain cohesive, mission capable teams. This challenge can be one of the most daunting a military leader faces. In this next case, a naval captain of a large vessel must decide how to act with regards to a developing situation that threatens the cohesion and mission capability of the sailors on his ship.

The Case of the Ship Captain

Captain Jones commands an aircraft carrier on patrol in the Mediterranean Sea. The United States is at war with a Middle Eastern country and the aircraft carrier supports this effort by conducting carrier based bombing missions and performing search and rescue missions over a certain area of operations.

During the last several weeks, there has been increasing unrest among the sailors on the ship who represent a minority group. These sailors have recently started circulating an underground newsletter to the sailors on the ship who represent this group, and they are now holding regular meetings to discuss the content of this newsletter. Each newsletter has been a diatribe against the exploitation of this minority group by elites in American society. Very few children of rich and politically powerful parents have volunteered to serve in the U.S. military in this conflict. The newsletter attributes the disproportionate percentage of minority sailors on the ship to economic conditions back home, which they

argue have given them no other choice but to enlist in the military for the benefits and security it provides. Most of the members of this minority believe that the current military conflict is morally unjustifiable.

Captain Jones observes what appears to be a trend. Since the newsletter debuted and the meetings commenced, there have been marginal to moderate increases in the incidents of disciplinary actions taken against members of this minority group. The newsletters do not go so far as to explicitly encourage members of this minority group to disobey orders or to advocate the overthrow of the U.S. government. That implication can be inferred though from the content of the newsletter.

Captain Jones believes that some of the members of this group might be found guilty in a trial by courts martial on several counts. The Supreme Court and the Court of Military Appeals have ruled that the military institution cannot permit speech that threatens mission accomplishment. The courts have upheld that suppression of speech is justifiable if it threatens the superior-subordinate relationship, negatively affects unit morale and discipline, or otherwise may negatively affect national security interests.

By and large the members of this minority group continue to perform their professional duties competently. Captain Jones' chief legal officer has advised him that the newsletter and meetings constitute a conspiracy to foster disloyalty and insubordination. The leaders of this minority group have requested a meeting with Captain Jones to discuss their complaints.

According to Gert, Captain Jones has a formidable set of moral obligations associated with role specific duties (reinforced by law) that pertain to commanding a military naval vessel with over 3000 sailors on board. In general, these primary role-specific duties are to competently command his ship and execute the missions that are assigned to him by the Joint Operational Commander in charge of the theater of operations. Any significant threat to the morale and discipline of the sailors on his ship merits immediate action. When Captain Jones competently executes his command function aboard ship, providing the leadership the ship needs to accomplish its mission and maintain morale and discipline, he obeys the moral rules "Do your duty" and "Obey the law."³⁹ Captain Jones is confronted with a moral decision in this case. According to Gert, how Captain Jones responds to the minority group may cause or increase the probability of causing pain, loss of freedom, and loss of pleasure for the members of the minority group. Since we may presume that Captain Jones is a competent and conscientious ship captain,

³⁹ See footnote 31.

he will make his decision with the goal of preventing worse harms that may result from degraded mission capability and significant discord among his sailors. We do not know this as a fact, but Captain Jones' decision may prevent attempted mutiny, sabotage, serious injury, or death.

Captain Jones has to decide how to act in response to the minority group's practice of holding regular meetings and distributing an incendiary newsletter. If Captain Jones' decision were only a legal one, this case would not be very interesting. Captain Jones would only need to refer the matter to his legal staff for immediate action. Captain Jones' decision is a moral one, however, because referring the matter to the courts is not his only or necessarily his best alternative under the circumstances. Immediately referring the matter to the military courts could be a knee-jerk reaction to a morale problem that would best be served by more subtle moral leadership that avoids polarizing the sentiments of his sailors and deteriorating morale further. Immediately referring this matter to his legal staff might result in more harm to mission capability, morale, and discipline. Captain Jones wants to prevent these harms. To Gert, legal action would also result in harms that most of the minority sailors would presumably want to avoid, such as trial by court martial, demotion, dishonorable discharge, confinement, and forfeiture of pay and allowances.⁴⁰ Captain Jones has a duty to prevent these harms when it is in his power to do so through competent leadership.

This case does not clarify whether this minority group on this ship has violated the moral rule "Obey the law" in ways that can directly be attributed to the newsletter and the meetings. Even though the free speech rights of military professionals are more limited than those of ordinary civilians, they are not totally eliminated when persons volunteer to serve in the American military. Restricted speech is limited to speech that compromises mission effectiveness, negatively affects morale and discipline, undermines the superior-subordinate relationship (chain of command), and compromises national security.

⁴⁰ These punishments and limitations on them are prescribed in chapter 8 of the UCMJ and in particular military service regulations that discuss nonjudicial punishment.

Captain Jones has much discretion in determining whether the speech that this minority group engages in through the newsletter and the meetings should or should not be censured, and if so, how much. Many military professionals sometimes disagree with the missions that their civilian leaders order them to perform, and they sometimes disagree with the tactics and strategies that their military commanders use to accomplish missions that these military professionals agree with in principle. To Gert, these disagreements are usually the result of different interpretations of the harms and benefits at stake, different prioritization of the harms at stake, and different interpretations of the facts of the particular situation. The fact that this minority group has expressed strong disagreement with the current military conflict and lament the economic conditions that they believe have forced them into military service are not alone sufficient to warrant ordering taking legal action. To Gert, people are morally accountable for what they *do*, not for what they think. Military professionals have a diversity of opinions on many subjects. As long as these military professionals perform their duties competently, they are behaving as honorable military professionals.

Captain Jones' moral decision in this case is complicated by the fact that the minority sailors are continuing to competently perform their duties. Though he notices an upward trend in incidents of disciplinary action among this minority group, these incidents are not necessarily *caused* by the newsletter or the meetings. Many competent sailors do not have squeaky-clean personnel records. Since the minority sailors continue to perform their duties competently, they are presumably executing the orders they are given in a timely manner. Their beliefs about these orders and broader mission goals are not necessarily relevant. The minority sailors are obeying the moral rules "Do your duty" and "Obey the law" with regard to performing the mission essential tasks they are assigned. Captain Jones has no way of conclusively knowing whether this increase in incidents of disciplinary action is a temporary phenomenon or is indicative of greater numbers and gravity of incidents to come.

The minority sailors are not conscripted. If they were, their grievances would be more understandable, particularly if a disproportionate percentage of minorities had been drafted into military service. However, although it is important that the minority sailors believe that they have chosen to serve due to economic hardship, this fact is not necessarily relevant to Captain Jones' moral obligation to manage this situation. Whether the minority sailors are volunteers or conscripts, Captain Jones' still has a professional duty to command his ship, which includes accomplishing his assigned missions and maintaining the morale and welfare of his sailors as best he can. If the behavior of this minority group threatens his ability to carry out these professional duties, Captain Jones has a moral and legal responsibility to correct the situation, regardless of whether his sailors are conscripts or volunteers.

However, while Captain Jones' professional duties do not change regardless of whether or not his sailors are conscripts or volunteers, Captain Jones could determine that being a conscript or a volunteer is relevant to how he judges that he should act. Captain Jones would have to assess the situation and determine whether the morally relevant fact that the members of the minority group are conscripts or volunteers (who feel forced into service due to economic hardship) should affect his strategy for solving this problem on his ship.

Captain Jones has cause for concern that the conspicuously disloyal attitudes of the minority sailors will erode morale and discipline further and result in more acts of disobedience and illegality. This is the legal counsel's main concern. However, from the case description it would be rushing to judgment to conclude that the minority sailors are engaged in an intentional conspiracy. It is also possible that the minority sailors are simply blowing off steam and that most of them have no intention of fostering a mutiny or sabotaging the mission capability of the ship.

A crucial morally relevant fact in this case is that the leaders of the minority group have requested a meeting with Captain Jones to discuss their grievances. This initiative indicates the

minority leaders' willingness to discuss the issues and work towards a possible compromise.⁴¹

Captain Jones will make a more informed judgment about the intentions of the minority leaders, whether, e.g., they are engaging in a nefarious conspiracy or blowing off steam, if he waits until after this meeting to make a determination about how to proceed.

Captain Jones should accept this meeting, but he should plan his approach to conducting the meeting very carefully. He can approach the meeting in any of several different morally and legally acceptable ways. He can choose to be accommodating, intimidating, or diplomatic. The actions that he takes will be dictated by the approach that he chooses. If he is accommodating, he may let the minority group continue their activities as long as disciplinary problems return to normal levels.

If he takes an intimidating position, he can reinforce his power of command and threaten harsh legal consequences for harms that the group's activities cause to mission capability and ship morale. In concert with this approach, Captain Jones could order the minority group leaders to cease publishing the newsletter and having clandestine meetings. Or he can *impose* strict editorial guidelines to be met before the newsletter is published, requiring that the articles be reviewed and approved by someone outside the group. And he could order the group leaders to publicize their meetings and open them up to anyone on ship who wants to attend. Finally, Captain Jones could make it clear that if any members of the group require disciplinary action that can be linked to the newsletter and the clandestine meetings, then he will also discipline the group leaders as well, perhaps even more harshly.

If Captain Jones chooses the diplomatic route, he may want to communicate his responsibilities as captain and share with the group leaders why they need to work out a mutually agreeable set of criteria for the newsletter and the meetings. He could attempt to obtain "buy in"

⁴¹ A ship captain is like a dictator subject to legal restrictions. Ship captains have a great deal of power and authority. It is unlikely that the leaders of this minority group would be belligerent and disrespectful in the presence of a captain. They would be fortunate to have any of the captain's valuable time.

from the minority group leaders so they leave the meeting feeling empowered. This approach requires deft salesmanship. Captain Jones could state his willingness to allow the newsletter to be published provided that they tone down the incendiary language in it. Or he can share mission facts that might incline the minority leaders to look more favorably on the conflict that they are serving in. He can share some of his own frustrations about the conflict in order to communicate his understanding of their concerns, while reinforcing their crucial role in fostering a professional atmosphere aboard ship.

It is also possible that Captain Jones will have a preference for one of these strategies depending on his natural leadership style. However, if Captain Jones enters the meeting with an approach in mind, he will need to be prepared to change his approach in response to the behavior of the minority leaders. If he begins the meeting with an accommodating or a diplomatic approach, he may need to shift to a more autocratic style if the minority group leaders act disrespectfully or communicate their unwillingness to reach a compromise. Captain Jones has a professional duty reinforced by the law to quickly and justly counters any threats to the mission and the morale and discipline of the sailors under his command.

Captain Jones also has a few other alternatives that will affect the tone and perhaps the outcome of this meeting. He can invite his legal counsel to be present. This fact might make the minority leaders defensive. He can also choose a particular venue for the meeting such as an office or conference room. And he can affect the many details of the meeting such as whether he is in uniform or not, or whether he sits behind his desk or in a more conversational setting like gathering on soft chairs around a coffee table. He can offer or not offer refreshments to the group leaders. In short, there are any of a number of environmental details that Captain Jones can use to affect the tone of this meeting and its possible outcome. If he is an apt commander, he will take these details into account.

Most importantly, Captain Jones must conduct the meeting so that the minority leaders are clear about performance expectations that must be met after they leave the meeting. The

minority group needs to know that the meeting is a potential turning point, that the minority group's accountability for subsequent harms that result from their newsletter and meetings may invite legal sanctions. The minority leaders should leave the meeting aware that they share a significant burden of responsibility for the legal sanctions that members of their group will suffer as a result of insubordination and disobedience incited by the newsletter and the meetings. Captain Jones should identify specific criteria that will be used to evaluate the minority group's activities in the future. The minority leaders need to clearly understand what these criteria are and their need to communicate these criteria to members of the minority group.

Captain Jones' time is valuable. He will need to guard against having too much of his time taken up with these sorts of meetings. Captain Jones does not have a professional duty to have personal meetings with everyone on his ship who has grievances. Meeting with the leaders of this minority group is appropriate because the potential harms that could result to his mission and the welfare of his crew are significant enough to warrant a special meeting in this situation. However, Captain Jones is not morally required to have this meeting. He would be acting within his moral and legal rights as ship commander if he denied the meeting and ordered his subordinate officers to take appropriate actions as he directed at a meeting of his staff. This alternative increases the risk of exacerbating the minority group's grievances and has the potential for making a precarious situation worse, necessitating the involvement of his legal staff.

Having this meeting is Captain Jones' prerogative, but he also needs to be careful not to undercut his chain of command. Captain Jones will need to have a subsequent meeting with the officers on his ship to inform them of the results of the meeting and the criteria his officers are to use to evaluate the minority group's activities and the similar activities of other groups in the near future. Captain Jones' chief legal officer should stand by in case her services are needed in response to failures of the minority group to follow the Captain Jones' performance criteria.

Commanders, including ship captains, come from diverse cultural backgrounds and have a diversity of leadership styles. If Captain Jones chose to act the way that I think the facts

warrant, i.e., hold the kind of meeting that I propose, then some fully informed moral agents might disagree with the solution that I advocate. Some moral agents would probably opt to make this issue a legal one immediately. This seems like a morally acceptable alternative, though I do not think it is the best alternative. A few fully informed moral agents might opt for another alternative, such as delegating to lower ranking officers on the ship the task of communicating performance criteria to minority sailors in their areas of responsibility. This solution is morally acceptable and it follows the principle of the chain of command more strictly. Other moral agents might opt instead to meet with the sailors in the minority group *en masse* rather than meet with minority leaders alone. This solution seems the most plausible alternative to the one that I outline above, since the minority leaders the captain would meet with are not official "leaders," but unofficial ones.

None of these proposed alternatives are illegal or constitute a breach of the ship captain's professional duties. For Gert, each of these alternatives could be made a practice that at least some fully informed moral agent would publicly accept. Thus, each of these alternatives are at least weakly justifiable. The fact that American military commanders, including ship captains, have discretion to assess situations like these and frame moral decisions (subject to legal constraints) consistent with their assessment of the morally relevant facts illustrates why Captain Jones' decision in this case is a moral one. His best solution is not necessarily a by-the-book solution, but one that requires deft moral judgments that relies on years of experience balancing the moral issues involved with leading what amounts to a city at sea. It would be difficult to estimate what the consequences of implementing each of these alternatives (there are no doubt more options) would be.

Because Captain Jones' decision is a moral one, he will probably have to make additional moral decisions on this issue in the near future in response to actions the members the minority group, and other groups influenced by their actions, perform in the future. If his solution fails to work as he hoped, he will have to try another alternative that is consistent with maximizing the

mission effectiveness of his ship and maintaining the morale and discipline of his sailors. Captain Jones' next decision is not necessarily limited to the legal option either.

The two cases I analyzed thus far pertained to officers with significant responsibilities for troops and equipment. The potential negative consequences of the moral decisions they made are significant, including each of the harms listed in Gert's first five moral rules, i.e., death, pain, disability, and loss of freedom and loss of pleasure. However, many lower ranking military professionals confront moral decisions as well in performing their professional duties. These decisions may not cause or prevent as much harm as the moral decisions of higher-ranking officers, but they are moral decisions nevertheless. The decisions of lower ranking supervisors, e.g., are morally significant, since the moral decisions that these supervisors make also involve harm or an increased risk of harm.

The Air Force Master Sergeant and the Performance Appraisals

Master Sergeant Smith is a maintenance supervisor in a U.S. Air Force squadron. Sergeant Smith leads a ten-person maintenance crew responsible for repairing and maintaining refueling booms on KC-135 refueling aircraft.⁴²

Several years ago the U.S. Air Force implemented a "new and improved" annual performance appraisal system for assessing the performance of enlisted troops. Supervisors use a form to appraise a troop's military performance in several categories such as professional development, ability to work with people, technical competence, and potential for increased responsibilities. In each of these categories, supervisors assign a number from one to five for that performance area. A "one" rating indicates unsatisfactory performance, a "two," marginal performance, a "three," satisfactory performance, a "four," excellent performance, and a "five," indicates "outstanding" performance. Under each review area, supervisors have a block of space where they can make comments to support their rating of the subordinate in question. Supervisors have to make comments, and they are strongly discouraged from not using all of the space provided.

It became obvious to military personnel soon after this new system was implemented that supervisors Air Force wide were giving most of their subordinates "all fives" on their performance reviews. Obviously every subordinate in the U.S. Air Force does not perform in an outstanding manner. This "five" rating was meant, "ideally," to be reserved only for the best of the best.

⁴² KC-135's are old Boeing 707s fitted with fuel bladders. These planes circle an area of operations and perform air refueling missions on any other Air Force planes equipped for mid-air refueling.

Sergeant Smith is troubled by this trend. He is pleased that each of the subordinates on this maintenance team are competent performers in all areas, but only one of the ten is what Sergeant Smith would consider to be an outstanding performer who is ready for promotion and higher levels of responsibility. It is time for Sergeant Smith to do annual performance appraisals on two of his average performers. Sergeant Smith feels that giving both "all fives" on their appraisals would not accurately reflect their performance over the past year. However, given the current practice of inflating performance appraisals, giving these two subordinates the rating they deserve would, given the practice of appraisal inflation, make their performance appear worse than it actually is. Sergeant Smith is loyal to all of his subordinates and feels that they work well as a team. He does not want to do anything to jeopardize the team cohesion that he has worked very hard to nurture and develop. What should Master Sergeant Smith do?

I analyze this case using Gert's two-step moral decision procedure as a guide. This case illustrates a common moral problem that not only pervades the appraisal process in the U.S. Air Force, but probably other military and corporate organizations as well. How can Sergeant Smith accurately communicate the performance of his two subordinates within this inflated appraisal system without compromising his integrity? Sergeant Smith thinks that the current system obfuscates the distinction between average and outstanding troops. He is reluctant to inflate the appraisals of these two average performers yet he feels pressure to do so. U.S. Air Force regulations only specify that a specific appraisal form will be used. Thus, Sergeant Smith is not breaking the law if he inflates his ratings of these two average performers. Supervisors have significant latitude in prescribing the content of their appraisals. Whether or not Sergeant Smith inflates these two appraisals is not a legal issue, but a moral one. If he can morally justify the content of his appraisals to his superiors (his immediate superior will probably have to endorse the appraisals) they will be accepted into his subordinates' official records.

If Sergeant Smith simply assigns his troops the numerical rating that they deserve (under ideal conditions) he will cause harms to his two average troops that they do not deserve. Under the current appraisal system, promotion boards would surely interpret an average numerical rating in any area as unsatisfactory performance. There is a significant probability that if Sergeant Smith does rate these two subordinates as average, then these subordinates will be considered worse than average. They will not be promoted; they will be considered problem cases; and they

will not be considered competitive for future positions of responsibility commensurate with their rank and expertise. They *are* competent performers, and they need to be rated in a way that will communicate that information accurately.

Sergeant Smith is loyal to his troops and wants them to succeed personally and professionally. Though he would prefer to rate his two competent troops realistically, he also does not want to victimize them with ratings that they could only reasonably expect to earn under ideal conditions. If he does rate them as average, he is aware that their careers will be unfairly and negatively impacted. If these troops have families, his loyalty to an *ideal* appraisal system will probably result in harms to their families as well. If he rates these troops as average, there is also a significant probability that the morale of these two troops would plummet if they were given these ratings. Sergeant Smith's troops will be familiar with the appraisal system as it is currently employed and would most likely interpret average ratings as indicative of strong supervisor dissatisfaction with their duty performance. As a result, these troops might really begin to perform unsatisfactorily, which would result in additional harms for themselves, their families, their maintenance team, and the broader refueling mission. These results would also negatively impact Sergeant Smith's annual performance review, which is forthcoming. Gert would interpret these harms as significant compared to the harms Sergeant Smith would suffer (apparently only psychological harms) from appraising his troops consistent with current Air Force custom.

Given these morally relevant facts, Gert would conclude that one of Sergeant Smith's morally justifiable alternatives is to follow current appraisal practices and give his two average performers inflated performance ratings. Following this course will prevent many unnecessary and avoidable harms that Sergeant Smith, his troops, their families, his maintenance team, and potentially the refueling squadron want to avoid. Following current appraisal practices will also produce benefits, such as keeping Sergeant Smith's maintenance team's morale high and mission capability as satisfactory. Sergeant Smith's career will be protected and perhaps enhanced. The

mutual loyalty that he has worked hard to develop and maintain on his team will be preserved. The performance of these average troops might even improve as a result of these inflated ratings. Sergeant Smith has a professional duty derived from the moral rule "Do your duty" to build and maintain the competence and loyalty necessary to keep his maintenance team performing their best. The harms prevented and benefits gained from following the implicitly accepted inflated appraisal system far outweigh the harms that would result from taking a unilateral stand against this system and rating his two average performers as "average."

Gert would think it a morally relevant fact though to consider the impact Sergeant Smith's inflated ratings of his two average performers would have on his single outstanding performer. Sergeant Smith also has a professional duty to ensure that his outstanding troop is appropriately recognized as such and given increased opportunities for faster promotion and greater responsibility than his average troops. Sergeant Smith should not let his "crack" troop become lost in a bureaucracy that falsely rates all competent performers as outstanding ones. It would be an injustice if one of Sergeant Smith's average performers were promoted or given supervisory duties ahead of his outstanding troop.

If Sergeant Smith's "crack" troop were not appropriately rewarded for her outstanding work, other negative consequences would probably result. Her morale would properly drop and this would have a deleterious effect on her performance. She might conclude that the sacrifice of maintaining peak performance is no longer worth the effort. She could become just another average performer or leave the Air Force for another profession where her stellar work was more fairly rewarded. Sergeant Smith should work to prevent these results. Sergeant Smith does not want to unfairly harm his average performers with ratings that would be perceived as worse than he intends, but he also does not want his outstanding performer to be unfairly penalized with ratings that would be perceived less favorably than they ought to be.

In the context of this appraisal system as it is currently employed, Sergeant Smith needs a morally justifiable alternative that would enable him to communicate accurate performance

information without causing undue harm to his average performers. According to Gert, considering this alternative is a crucial morally relevant fact in moral decision making in controversial cases.

Gert would also consider the following alternative a morally justifiable compromise. The case description says that under each numerical rating on the enlisted appraisal form is a block for making comments about troops' performance in a particular rating area. Comments are expected in these blocks. Even if Sergeant Smith inflates his ratings of his average troops, he has more latitude in the "comments" blocks to tailor the language he uses to differentiate outstanding performers from average ones. Using quantitative language that is clear and precise effectively makes performance distinctions without causing the unjustifiable harms that would result if Sergeant Smith rated his average performers realistically. For example, for his outstanding troop in the "technical competence" section, Sergeant Smith can use statements like "This troop is my number 1 of 10!" and "She raises the bar for the rest of my team." For his average performers in that section he can make statements such as "Handles complex maintenance tasks with minimal supervision" and "Does everything I ask and then some." Both of these pairs of statements communicate competence and reflect positive contributions to the unit, but the first two comments effectively distinguish his outstanding troop from the other members of his maintenance team. The second pair of comments suggests competent performance of duties. Military personnel in charge of making assignments and assessing troops for promotion will most likely be able to discern that one troop is outstanding and the others are assets, but merely competent ones.

Giving the average troops inflated ratings *in concert* with using precise language in the comments sections has the benefit of not causing unnecessary and unjustifiable harm to average performers while increasing the probability that exceptional performers will be justly rewarded for their outstanding contributions. This compromise is a practical solution that Sergeant Smith

can implement in order to avoid the negative results that would occur if he appraised his average troops the way that would be appraised under ideal conditions.

That Gert would prefer this alternative to rating the average troops as they would be rated under ideal conditions does not imply that Gert would consider the inflated rating system a good system. Gert would agree that inflated ratings pose a problem, but that the harms and benefits at stake make working within this imperfect system a more strongly justifiable alternative. Gert would also approve of Sergeant Smith taking other measures to communicate his dissatisfaction with the inflated appraisal system to appropriate authorities who can make improvements to the appraisal system in a more standardized way.

Sergeant Smith is one of among thousands of supervisors in the U.S. Air Force. If he and a sufficient number of other supervisors like him complain through appropriate channels, word will get to commanders and policy makers. Standardized adjustments to the current appraisal system will be implemented. This process can take years, but it would eventually lead to changes in the appraisal system without causing unjustifiable harms to competent subordinates, their families, and their units. In this particular case, mission capability and the welfare of his subordinates are best preserved if Sergeant Smith works within the system as it is currently employed. Giving realistic appraisals to average performers in protest of the appraisal system as it is currently employed violates the moral rule "Do your duty."

It is worth considering for a moment whether Sergeant Smith is acting *deceptively* when he inflates his average performers' appraisals. In one sense doing so seems overtly deceptive; in another, it seems as if the practice of giving inflated ratings is an Air Force custom born out of three sources; the strong bonds of loyalty that develop in cohesive units between superiors, subordinates, and peers; the desire of Air Force supervisors to avoid uncomfortable situations, such as telling troops that they are only average performers; and the desire of most troops to have successful careers. Inflating an average performer's performance ratings *may*, however give average performers the mistaken impressions that they are better troops than they are. It also may

give promotion boards a false impression that some troops are better than they really are. If the practice of giving inflated ratings results in some average troops getting promoted ahead of exceptional troops or results in some average troops being assigned to positions that need exceptional performers in those positions, then much unnecessary harm is possible. If, however, the numerical ratings are used in concert with appropriate discriminating language, then the practice is a morally acceptable alternative; it minimizes the probability that these harms will result.

Sergeant Smith can minimize the probability that deception will result from the inflated ratings if he takes additional steps to communicate his goals for the appraisal process to subordinates. Let us say that if Sergeant Smith takes these additional steps that he is pursuing "ideal performance appraisals." (He is not required to take these additional steps, but considering the possibility of deception, he should be encouraged to do so). In addition to doing written appraisals on his troops, presumably Sergeant Smith has to present these appraisals to his subordinates in person for review, discussion, and signature. These meetings would be an appropriate venue for Sergeant Smith to carefully discuss the appraisal process with his troops and to explain how the language that he uses differentiates average from exceptional performers without causing unfair and negative results. These meetings could reinforce the mutual loyalty between Sergeant Smith and his subordinates, while importantly reinforcing the need to strive for continuous improvement.

It is possible that Sergeant Smith's average performers are content with performing at an average level, that they like their jobs, know themselves well, and have chosen not to pursue greater positions of leadership and responsibility. For Gert, these are morally acceptable choices that violate no moral rules. However, they are choices that Sergeant Smith should make an effort to become aware of. It would be an added negative result if inflated appraisals caused average performers to be assigned to positions of responsibility that they do not want at the expense of hard chargers who does want to advance. Sergeant Smith would be pursuing "ideal performance

appraisals” if he set aside some of his valuable time to dispel misconceptions that his average performers might infer about the quality of their work from the written appraisals, and if he took additional steps to find out what the desires of each of his subordinates were.

Even though Sergeant Smith is troubled by the trend of inflated appraisals in the Air Force, it is helpful to explicitly apply step two of Gert’s two-step decision procedure to Sergeant Smith’s alternatives. Would fully informed moral agents publicly allow the practice of letting enlisted supervisors rate their subordinates the way that Sergeant Smith would like to rate his average performers, given the current appraisal system? What would be the estimated consequences if the Air Force announced through official channels that enlisted supervisors were encouraged to buck Air Force custom and rate their subordinates realistically if they had a personal moral conflict with the inflated appraisal system? I have already described the negative consequences that would most likely accrue to Sergeant Smith’s average performers if he acted this way. If many more supervisors who shared Sergeant Smith’s views on the rating system followed suit, then even more unnecessary and avoidable harms would result. The appraisal system would become increasingly unfair and many more competent service members would be unnecessarily harmed. Those that were harmed would suffer from a “twist of fate,” since subordinates generally do not choose their military leaders. The appraisal system would be applied so inconsistently that it would be even more difficult to discern incompetent from competent performers.

How would other Air Force supervisors who do not have this moral conflict react to this announcement? Even if many supervisors would concur that the appraisal system had an “inflation problem,” most of these supervisors would implicitly recognize that rating their troops realistically would probably cause unjustifiable harms their troops. Even those supervisors who admitted that enlisted supervisors had a right to rate their subordinates realistically according to Air Force policy would most likely conclude that supervisors who did so were being harsh and insensitive to their troops’ and the Air Force’s needs. Most supervisors would realize that if some

supervisors followed the appraisal system as it was intended that many other supervisors would not, including many supervisors who shared Sergeant Smith's moral conflict. The bonds of loyalty in military units are strong. In fact, many of these supervisors would feel sorry for the subordinates under these "realistic raters" yet secretly hope, because of their own unit loyalties, that other supervisors' strict interpretation of the appraisal system would increase their own subordinates' opportunities for advancement. Other Air Force supervisors would recognize that even though inflated ratings might be a problem, other options are morally preferable than encouraging enlisted supervisors to follow their consciences regardless of the negative impact on subordinates' egos, careers, families, and units.

In contrast, the estimated consequences of publicly allowing the practice of inflated ratings to continue would be less harmful, particularly if supervisors were made aware of the ways that they can use language to identify outstanding performers apart in the comments sections. Following this alternative has the benefit of being more fair than the previous alternative. Average performers would still be recognized as average. Outstanding performers would most likely be identified and promoted through the use of carefully chosen language used in comments sections. The negative consequences of this practice are that an imperfect appraisal system is reinforced. However, Gert would agree that these problems would be handled in more appropriate ways at the policy level, where standardized remedies could be applied.

Although Sergeant Smith has a conflict in his conscience about the "inflation problem" in the Air Force enlisted appraisal system, his conflict is not what I consider to be a "crisis" of conscience. However, occasionally military professionals are embroiled in a situation where the conflict in their conscience reaches crisis proportions. The following case describes a military officer who had acted on a crisis of conscience, deciding that he had to act contrary to the rules of engagement established by his Joint Task Force commander. This case is more complex than the case of Master sergeant Smith. The case and my subsequent analysis follow.

The Case of the Conscientious Lieutenant

The following case is a more complex one that concerns the issues of consent, obedience, loyalty, and military necessity. I will describe the case and then analyze it using the aforementioned concepts and Gert's two-step procedure.

Lieutenant Baker is an intelligence officer serving in a U.S. humanitarian mission in a Central American country. The mission calls for replacing a brutal military dictator with a duly elected president currently living in exile in the U.S. and *supposedly* calls for providing logistical and medical support to impoverished citizens of that country. Lieutenant Baker's primary duties are to assess intelligence reports and brief intelligence operatives of possible threats to U.S. forces in country. As a result, Lieutenant Baker has access to more information than most military personnel serving in this mission. The dictator has already fled the country, but his cronies are still running the prisons.

Lieutenant Baker is aware that this dictator's cronies are perpetrating egregious human rights abuses, particularly in the prisons. She believes that the U.S. military's primary mission in this operation should be to correct these human rights abuses. Reports that Baker read stated that mutilation, torture, and starvation were the norm. Most of these inmates are political prisoners that oppose the military dictator. Lieutenant Baker became very disturbed after reading one report that likened the physical condition of these political prisoners to concentration camp victims in WWII. Lieutenant Baker is Jewish and she visited several Nazi concentration camps while on a summer trip during her college years.

Lieutenant Baker is very disturbed that she has been ordered to prioritize *force protection* of U.S. troops. Apparently the political situation back in the U.S. is tense because a recent poll suggested that over 90 percent of U.S. citizens feel that the mission in this small and backward Central American country is *not worth one U.S. soldier's life*. The commander of the mission was instructed by civilian leadership to avoid U.S. military casualties at all costs while facilitating a smooth transition of the elected president into power.

The *rules of engagement* strongly emphasized force protection. U.S. troops were only to use force only when they were threatened with violence. Violence between civilians was to be ignored. Most U.S. troops were ordered to stay behind barbed wire and sandbag emplacements and were forbidden to leave U.S. compounds unaccompanied. When troops did move about in the countryside, they had to be in convoys of at least two vehicles, with at least two persons in each vehicle. U.S. troops had a number of tense confrontations with unruly crowds, but violent incidents were few.

Lieutenant Baker expressed her strong disagreement with these rules of engagement to several parties involved in this humanitarian mission. She felt that if the U.S. military was not going to correct the human rights abuses in this country, then there was no legitimate reason to be there. She was particularly concerned about the condition of political prisoners. All of her efforts to work through official channels to care for and free these prisoners failed. She sought assistance from the mission's legal officer, the

command chaplain, her commander, and the military police. Each of these parties told her to focus on the rules of engagement, which prioritized force protection of U.S. troops. Finally, Lieutenant Baker filed a complaint with the Inspector General in an attempt to force the commander to shift his emphasis from force protection to human rights abuses. The IG did not refuse her complaint, but that same IG also tried her best to discourage Lieutenant Baker from filing it. The IG told her flat out that she would not "fast track" her complaint and that it would take a few weeks before she received a reply.

Lieutenant Baker concluded that she had exhausted official channels and decided to take unilateral action to help the political prisoners. She put on her battle dress uniform, careful to take her digital camera, and slipped out of the U.S. compound undiscovered. She proceeded on foot to a nearby prison. At the prison, she loaded her pistol, confronted the guards and gained entry. Agitated and armed, she demanded a tour of the facility.

One of the prison guards slipped out the back of the jail and got word to U.S. military police stationed at a nearby checkpoint. These troops radioed the command post at the U.S. compound for further instructions. The command post dispatched a detail of military police to the prison, and Lieutenant Baker was taken into custody. She was relieved of duty and sent home to await legal action.

This case is instructive on several levels. The moral decisions of several parties are relevant to this case, such as the legal officer, the chaplain, and Lieutenant Baker's commander. My analysis focuses on Lieutenant's Baker's decision to unilaterally violate the rules of engagement in order to inspect and photograph the condition of political prisoners in a local jail.

This case is also instructive for sensitizing soldiers at various levels to potential moral conflicts that they are likely to wrestle with while serving in the U.S. military on humanitarian and peacekeeping missions. Soldiers routinely face moral conflicts that arise from competing duties to superiors, subordinates, conscience, peers, family, God, country, various institutions, and humanity in general. Sometimes professional duties conflict with the humanitarian values of individual troops.

The case is instructive for supervisors and commanders who must counsel subordinate that are experiencing these moral conflicts. The case is also instructive for military planners and strategists who must balance institutional directives with concerns for human rights and the protection of U.S. forces, particularly when the U.S. public firmly believes that certain missions

are irrelevant to the military's core function of fighting wars and defending vital national interests.

It is *prima facie* calloused and immoral to blindly follow institutional procedures at the expense of egregious human rights violations, particularly when the risks to U.S. troops are minimal and significant harms can be prevented. Rules of engagement that prioritize force protection above all other considerations unnecessarily restrict U.S. troops from taking initiatives that would prevent great harms with comparatively minimal risk. In this Central American country, the force protection policy is translated into rules of engagement that allow virtually no risk to U.S. soldiers, regardless of the consequences.

Are Lieutenant Baker's actions morally justifiable? She obviously violated the rules of engagement. In a theater of military operations, rules of engagement are generalized military orders; assuming they are legal orders, soldiers are morally required by the moral rules "Do your duty" and "Obey the law" to obey them. Military personnel are not entitled to change the rules that their commanders and civilian leaders establish simply because they believe that these rules cause more harm than good. The rules of engagement in this mission are legal orders. Lieutenant Baker has a professional duty to obey them.

Lieutenant Baker's duties are to read intelligence reports in order to alert intelligence operative of potentials threats to the security of friendly forces. She was prohibited from leaving the U.S. compound alone without military escort. She placed herself at increased risk of harm. She also endangered the U.S. troops that were dispatched to bring her in. If she had received permission from appropriate authorities to inspect and photograph conditions at this nearby prison, then her actions would have been morally justifiable, even if her superiors made a mistake in granting her this permission. Her superiors would have been responsible for the consequences.

Lieutenant Baker also violated several provisions of the Uniform Code of Military Justice. She was absent without leave, she disobeyed orders, she engaged in conduct unbecoming an officer, and she failed to report for duty. However, the fact that Lieutenant Baker committed

military crimes, violating the moral rule "Obey the law," does not answer the pivotal question of whether unilateral action was morally justifiable for additional reasons.

For example, was Lieutenant Baker morally justified in her actions because she exercised initiative to contribute to the humanitarian goal of "providing logistical and medical support to impoverished citizens of that country?" Was it appropriate that she placed loyalty to this goal over loyalty to the rules of engagement? Was this duty weightier? Presumably, if this interpretation were true, then Lieutenant Baker was alone in performing the actual duty of U.S. soldiers in this Central American country while other troops who were excessively wedded to the rules of engagement were failing to execute their primary duties. Would Gert consider Lieutenant Baker's interpretation of this situation to be morally justifiable?

While this interpretation is a possibility, it would be an implausible conclusion to ascribe to Lieutenant Baker. Even if this interpretation were true, Lieutenant Baker's fateful decision violated the functionally necessary organizing principle of the military chain of command. Lieutenant Baker was certainly entitled to her view that the U.S.'s humanitarian mission in this Central American country had digressed from its primary purpose. However, as a lieutenant she would rarely be empowered to unilaterally act on these beliefs. According to Gert, the consequences of publicly allowing lieutenants to have such latitude are potentially very dangerous to the military's ability to function effectively and to minimize harms to friendly military personnel. Given the circumstance of this case, Lieutenant Baker's loyalty was misplaced. Her professional duty was to "Do her duty," to obey the legal orders of her superiors, lead and care for her subordinates, and competently carry out the mission directives that she was assigned.

Lieutenant Baker was also naïve to think that she was permitted to interpret the broader mission with this much latitude. Even if she were correct in her interpretation, her actions were imprudent; a policy of giving this sort of interpretive latitude to lieutenant's on humanitarian and peacekeeping missions is potentially very damaging to the military institution; it would cause

unnecessary harms that all military personnel want to avoid for themselves and those that they care about.

Lieutenant Baker may have thought her moral justification for unilateral action came from other sources, such as relevant military regulations that prescribe procedures for humanitarian assistance and peacekeeping missions. Perhaps Lieutenant Baker thought that her actual duty was prescribed in these other sources. For example, in Chapter 9 of the Civil Military Operations Handbook of the U.S. Army (Field Manual 41-10) describes procedures for how to monitor, record, and intervene to stop human rights violations.⁴³ While it is possible that Lieutenant Baker was familiar with these regulations, they do not morally justify her unilateral actions either. Regulations and procedures are occasionally ignored when militarily necessary to accomplish particular missions set by national command authorities. Lieutenant Baker had no legal or moral authority to decide that the rules of engagement could be overridden merely because she interpreted procedures described in particular regulations as absolute rules.

U.S. Air Force pilots are required by regulations to have a bachelor's degree and a minimum of 20/20 vision. These rules exist to reduce the risk of harm listed in Gert's list of moral rules. These rules improve safety and maximize training success rates for pilot training programs, where the average cost per pilot candidate is over one million dollars. However, pilot training entrance standards may be relaxed in response to a dearth of pilots because of other harms such as attrition or disease. To give another example, military planes are considered mission capable during peacetime only when they meet specific maintenance and inspection standards described in various regulations. During military conflicts, situational contingencies sometimes make it militarily necessary to relax these standards in order to generate sorties to prevent worse harms, such as countering a serious threat to national security. This sort of

⁴³ U.S. Army Field Manual 41-10 (FM 41-10), *Civil Affairs Operations*, Washington DC: Department of the Army, 1993. Chapter 9 is available at <<http://www.globalsecurity.org/military/library/policy/army/fm/41-10/ch9.pdf>>.

interpretive latitude in response to the needs of military necessity can easily be applied to the civil military relations portion of FM 41-10 (Chapter 9). This interpretative latitude with regulations is consistent with Gert's view that all moral rules have justifiable exceptions.

While this case does not explicitly address these issues, it is important to point them out. Lieutenant Baker had little precedent for interpreting, e.g., Chapter 9 of U.S. Army Field Manual 41-10 as absolute rules that overrode the context specific rules of engagement established for her theater of operations.

A more reasonable explanation of Lieutenant Baker's decision and subsequent actions fits well with Gert's view that all moral agents use the common moral system, usually implicitly, to make moral decisions and judgments.⁴⁴ In this case, Lieutenant Baker assessed the morally relevant facts, particularly the conflict between the rules of engagement and the need to right egregious human rights abuses, and concluded that her foremost moral obligation was to prevent severe and unjustifiable human rights violations rather than obey the rules of engagement. Implicitly following the two-step procedure, she assessed the facts and decided that this situation supported violating the moral rules "Obey the law" and "Do your duty" (in this case her professional duty) in order to prevent harms to innocent political prisoners. Insofar as the other military professionals stationed in this Central American country followed the rules of engagement, Lieutenant Baker disagreed with their moral assessment of the situation, such as their apparently different rankings of the harms and benefits at stake in this mission. Lieutenant Baker interpreted the harms and benefits at stake in this situation as an emergency that required immediate action.

Another way to interpret Lieutenant Baker's conflict is as a conflict between actual duty and the law (cashed out in rules of engagement) rather than as a conflict between competing duties. This interpretation would make her actions civilly disobedient. On this interpretation, the

⁴⁴ CM, p i; MNJ, p 4.

rules of engagement were merely laws (as legal orders) and her superiors' directives were legal directives. However, I do not think anything unique turns on this way of framing her decision. American military professionals are morally required to do their professional duty and to obey the law. Both of these moral obligations overlap more so in the American military profession than in American civil life. For Lieutenant Baker, obeying the law (rules of engagement) *is* also a professional duty. For Gert, obeying the law only ceases to be a moral duty when obeying those laws also commits morally unjustifiable violations of other moral rules.⁴⁵ Whether Lieutenant Baker's decision is viewed as a decision to override one duty to fulfill another duty or as a case of justifiable civil disobedience on behalf of suffering people, in her mind her actions were morally justifiable in virtue of the evils she hoped to prevent.

For Gert, estimating the probable consequences of Lieutenant Baker's actions supports the conclusion that her assessment of her moral responsibility for the suffering of the prisoners is at best *very* weakly justifiable. Lieutenant Baker has at best a minute and indirect moral responsibility for the suffering of political prisoners. She does not intentionally *or* unintentionally cause the violations of these prisoners' human rights or engage in actions that she should foresee will violate these prisoners' human rights. In addition, the obstacles facing her are too overwhelming for one person to surmount; thus, her actions have little to no chance of success. Given these facts, Lieutenant Baker incorrectly concluded that her moral obligation to unilaterally act to prevent harm to the prisoners overrode her duty to the rules of engagement.

In principle it is a noble thing to sacrifice one's interests to end egregious injustices. For Gert, on some occasions it is morally justifiable to break the law to do so.⁴⁶ For example, moral

⁴⁵ CM, p 36. Gert prefers not to use the word 'duty' as a blanket way of discussing obligations to obey moral rules. Rather, he prefers to discuss duties in terms of professional and social roles to clarify the distinction between professional and social obligations and general obligations to not cause harm. However, the military profession and Gert's theory fit nicely with regard to this overlap; for Gert, obeying the law is a moral duty.

⁴⁶ CM, p 36. For Gert, these laws must be especially evil to warrant disobeying them. Gert shares Hobbes' view on the subject of civil disobedience.

agents do not normally consider a person morally blameworthy for prudently running red lights to rush a heart attack victim to the hospital quickly. For Gert, these sorts of actions fulfill moral ideals and ought to be encouraged. However, when moral agents bring nearly certain and significant negative consequences on themselves as a result of actions that have nearly a zero chance of success, their actions are foolish, perhaps even irrational. For Lieutenant Baker, there are few if any compensating benefits to be had for acting the way that she did, given the case description.

We do not know from the case how Lieutenant Baker assessed her chances of success for achieving the goals of her unilateral action, nor do we know specifically what her goals were. Nevertheless, her actions demonstrated poor judgment and were bound to fail. She should have anticipated her imminent detainment and subsequent legal actions that would most likely be taken against her.

It is important to reemphasize that Lieutenant Baker fails to properly assess *her* moral responsibility for the suffering of the political prisoners. According to Gert, she is not only not morally required to act as she did, her actions are not actions that most moral agents would perform or encourage those that they care about to perform. This point is clarified by considering the morally relevant distinction between moral rules and moral ideals. Suppose that Lieutenant Baker gives no money to charity to feed people in imminent danger of starving to death. For Gert, giving this money to charity fulfills moral ideals. Failing to give to charities like Oxfam violates no moral rules; thus, giving money to charity is not morally required. However, even though giving money to a charity like Oxfam fulfills moral ideals, the comparison to Lieutenant Baker's situation is significant. It seems that Lieutenant Baker is morally *more* responsible (in virtue of her greater likelihood of preventing harms, i.e., succeeding in fulfilling moral ideals) for not preventing starvation than she is morally responsible for not preventing the suffering of political prisoners, given her powerlessness to prevent their suffering. Lieutenant Baker makes the crucial mistake of failing to grasp that preventing harm to prisoners fulfills moral ideals, and

also that acting on those ideals in this situation in this way is a futile endeavor. Otherwise, being a moral agent sensitive to human suffering, she would have given money to a charity like Oxfam rather than ruin her career through futile actions on behalf of the prisoners.

Lieutenant Baker's assessment of her moral responsibility for the suffering of the political prisoners is even more dubious given the fact that most moral agents implicitly employing the common moral system that Gert describes normally do not consider people who fail to fund charities like Oxfam to be guilty of violating of moral rules. To illustrate this point, if Lieutenant Baker gave money that could have gone to Oxfam to a project to save a tract of wildlife habitat, few moral agents would conclude that she was morally responsible for causing the deaths of starving people. Many moral agents would even applaud her commitment to preserving wildlife habitat. Lieutenant Baker obviously has less power to prevent harm to political prisoners in this Central American country than she has power to save starving people from death through charitable donations. Thus, it seems a serious mistake in moral judgment that she would consider herself so morally responsible for the suffering of these prisoners that she had to do *something*, especially when her efforts were bound to fail.

Another analogy clarifies Lieutenant Baker's poor judgment further. Suppose a baseball player makes a unilateral decision to steal a base without a signal to do so from his base coach. Suppose runners are on first and second with one out and the score is tied in the eighth inning. The batter is a good contact hitter and has only one strike. The runners know that the policy of their manager in these situations with a good contact hitter at the plate and runners on base is often to order a hit and run. However, in this case the manager does not instruct his base coach to communicate a hit and run sign to the batter and the runners. Suppose the runner on first is frustrated that his manager does not call for the hit and run in what seems like a perfect situation for it. Can the runner infer that he has a higher duty to implement his manager's general policy unilaterally and hence steal second base without the manager's explicit consent? No. Is the runner responsible for negative results that will occur if the hit and run play is not ordered? No.

If the runner unilaterally attempts to steal second base, his actions will fail miserably. The runner *and* the manager will look foolish, and the runner will only draw negative attention to himself, his manager, and his team. It is not sufficient for the runner to assert that the manager is wrong and that this mistake justifies unilateral action on the runner's part. The runner is part of a team that must work together according to the directives of the manager. In this situation the manager is justified in removing the player from the field, removing him from the team, and imposing an appropriate punishment, perhaps a stiff fine. The runner has everything to lose and very little to gain from unilateral action.

As with military officers, baseball players have some discretion to act independently within certain implicit and explicit guidelines established by their leaders. However, Lieutenant Baker's situation and the decision of the runner to steal unilaterally in the hit and run situation are inappropriate contexts for exercising this discretion. The fact that prisoners will suffer because of conservative rules of engagement or that the game might be lost from the manager's failure to seize the initiative in a particular inning do not justify unilateral action on Lieutenant Baker's *or* the runner's part.

The baseball analogy is different from Lieutenant Baker's situation in that the consequences of the manager's decision not to call the hit and run do not involve the prevention of egregious suffering. However, this difference is not a morally relevant difference since both actions will almost certainly fail. Moreover, since both actions are done in the context of a complex team effort, the relevant similarities hold up. Perhaps the batter is in a slump and the hit and run is viewed as too risky to the manager. Perhaps the manager lost important games in the recent past by failed hit and run calls and is under pressure from the owner and the fans to take a more conservative approach. That these factors would influence a baseball manager's game decisions does not seem unreasonable. These factors are similar to the situation surrounding this humanitarian mission. Political pressures are on civilian leaders to protect U.S. service personnel from harm. This political context and the cursory relationship this particular humanitarian

mission has to important U.S. national interests influences military planners to take a conservative position on force protection. The runner on first base probably does not know or fully appreciate the relevant facts behind his manager's decisions. As a lieutenant, Lieutenant Baker will not know and thus probably will not fully appreciate the relevant facts behind the formation of conservative rules of engagement. These rules of engagement are not hers to formulate.

A crucial consideration for assessing Lieutenant Baker's actions is to thoughtfully answer Gert's question for isolating morally relevant facts in concrete cases, "Are there any alternative actions that would be preferable?"⁴⁷ Does Lieutenant Baker have other alternatives that have a greater probability of preventing harm to political prisoners without negatively influencing her career, the integrity of the U.S. military institution, the integrity of the force protection policy, and the trust between superiors, subordinates, and higher civilian leadership? One alternative she has is to wait for the inspector general to review her complaint and render a decision. If this alternative fails, she can use her chain of command more effectively by making phone calls and writing letters to bring the plight of the political prisoners to higher-level attention. Lieutenant Baker does not exhaust these possibilities. Or she can leak the facts about the plight of the prisoners to the press, arrange for incriminating photos to be taken by sympathetic nationals loyal to the elected president, or work to arrange a tour of the prison through less confrontation avenues, perhaps using a local non-government organization or missionary society. These groups are normally more unfettered by military rules of engagement and less encumbered by the political considerations that make force protection *the* priority concern in this theater of operations.

Lieutenant Baker can also resign her commission, in contrast to enlisted soldiers, who sign an enlisted contract that may not be unilaterally revoked until the service contract is

⁴⁷ BRF, p 38.

complete. Unless an officer is running from a battle or committing other similar acts of crucial contextual importance, some of which are capital offenses, the officer can resign. If Lieutenant Baker resigns, she becomes free from the strictures of the rules of engagement. She is then free to take extra steps to aid the political prisoners. In this Central American country, she can probably join a non-government organization (like Amnesty International) to work on behalf of the prisoners.

While it is difficult to determine the likelihood that any of these other alternatives will succeed, each of these options presumably has a better chance of success than the actions she does take, and none of these alternatives have nearly as great a likelihood of causing such negative consequence to herself. Thus, it seems reasonable to conclude that she should have considered other alternatives more carefully.⁴⁸

I conclude this analysis by explicitly applying step two of Gert's decision procedure, i.e., by considering what the estimated consequences would be if Lieutenant Baker's actions and all other similar actions were publicly allowed and made an institutionally approved military practice. Considering the futility of her actions, either for preventing harm to prisoners in imminent danger or for publicizing the plight of these prisoners, the benefits of publicly allowing these actions would be *minimal* at best. It is remotely possible, but not probable, that on rare occasions actions similar to Lieutenant Baker's actions would achieve marginal success at realizing the actors' intended goals. However, these probabilities are difficult to estimate. For example, it is remotely possible that the publicity of Lieutenant Baker's disobedience might martial public support for interpreting force protection policies with more latitude in cases where a small but increased risk of harm to U.S. troops will prevent egregious suffering.

⁴⁸ Lieutenant Baker's failure to exercise prudent moral judgment in this case is indicative of precisely the kind of moral judgment failures that military leaders want to expose and correct in the training of young officers. Military leaders want young officers like Lieutenant Baker to remain morally sensitive to suffering, for this quality is a crucial check on military brutality. However, military leaders do not want Lieutenant Baker to become morally calloused. Is it her moral decision making skills that need developing.

If low ranking officers knew that they could unilaterally act on their own interpretations of particular rules of engagement, the negative consequences to the American military profession would be *significant* and negative. Lower ranking officers (Captains and Lieutenants) are frequently in situations where duress, time limitations, and epistemic limitations are severe. These conditions incline many young officers to make poor moral judgments.⁴⁹ In military operations, the temptation to make poor moral judgments is already exacerbated by these environmental conditions. Giving young officers latitude to unilaterally ignore rules of engagement in order to correct what they conclude are injustices serious enough to morally justify unilateral action would multiply these incidents of poor moral judgment. Much more harm would result than allowing this latitude would prevent. Giving young officers this latitude is like giving individual physicians the authority to make euthanasia decisions unilaterally when they concluded that such action was warranted by the circumstances of a particular case. This latitude would make the practice of euthanasia inconsistent. Much unnecessary and avoidable harm would result, including the undermining of public trust in the medical profession, a profession where trust absolutely crucial. Much more harm is caused from delegating discretionary authority to make euthanasia decisions to individual physicians than is caused from regulating the practice strictly and centrally, even though some physicians and citizens will probably disagree with established policies.⁵⁰

Many moral agents serving in this Central American country probably think that the rules of engagement overemphasize force protection, particularly if they know that these policies are

⁴⁹ These conditions retard officers' abilities to know enough relevant facts to make informed moral judgments, and these conditions skew officers' abilities to rank the harms and benefits at stake correctly.

⁵⁰ My claim is not so strong as to conclude that low ranking officer should have no discretionary to violate rules of engagement in any situation. This strong claim could be undermined by many counterexamples where violating rules of engagement was morally acceptable. My point is more specific, that young officers should not have the liberty to violate rules of engagement in cases that share the same morally relevant facts as this particular case. For Gert, the point of step two of the two-step procedure is to estimate the consequences of publicly allowing a violation of moral rules in the case at hand and *all similar situations that share the same morally relevant facts*. I am applying this restriction here.

grounded solely in political considerations back in the U.S. However, these disagreements rarely justify allowing low ranking officers the latitude to unilaterally violate rules of engagement as Lieutenant Baker did.

For Gert, moral agents will sometimes disagree with some of the policies and laws of their governments. In spite of these disagreements, governments are morally justified in establishing these policies and laws.⁵¹ If governments could not pass and enforce weakly justifiable policies and laws, they could not govern. Much more harm would result if governments were required to pass laws and form policies that only have unanimous acceptance. Anarchy would result.

Based on this analysis, Gert would conclude that Lieutenant Baker's actions in this case were either morally unjustifiable or, at best, very weakly justifiable. Even if a significant number of fully informed moral agents disagreed with the rules of engagement in this humanitarian mission, few to no fully informed moral agents would publicly allow the practice of giving low ranking military officers liberty to act unilaterally in situations that are relevantly similar to Lieutenant Baker's situation, especially when the chances of success are so remote and the significant negative consequences that result from instituting this practice are so highly probable. Lieutenant Baker's disobedience of legal orders through ignoring the rules of engagement is a punishable offence, as are other tangential offenses associated with this disobedience, such as conduct unbecoming and officer, absence without leave, and failure to report for assigned duties. A court martial of Lieutenant Baker would be warranted but not necessarily required, since nonjudicial punishment is a plausible alternative. However, if the suffering of the political prisoners was egregious, then something needed to be done. Lieutenant Baker's mistake may not have been the fact that she did *something*, but in that she did something in a foolish way. Her

⁵¹ For Gert, policies and laws that some fully informed moral agents disagree with are only weakly justifiable.

moral sensitivity in this situation is a good trait that military professionals want their comrades to have.

One criticism

Applying Gert's decision procedure to the actions of Lieutenant Baker's decision helps to guide the analysis in a way that is systematic and intuitive. However, it is important to identify one substantive criticism of how Gert's decision procedure cashes out the morally relevant facts and assesses the moral justifiability of Lieutenant Baker's actions.

Applying Gert's decision procedure to Lieutenant Baker's decision does not adequately account for the complex phenomenon of martyrdom. A martyr is someone who makes great sacrifices or suffers a great deal in order to further a religious or other belief, cause, or principle.⁵² Since Lieutenant Baker's chances of success were at best minimal and the negative consequences to her were significant and highly probable, her sacrifices seem to make her a martyr. She acted on principle in order to prevent the severe suffering of innocent political prisoners. She also acted in a way that guaranteed her disassociation from a military bureaucracy whose policies she loathed.

Gert defines morally relevant features as features that if changed could change whether a fully informed impartial moral agent could publicly allow a proposed moral rule violation and all other moral rule violations of a relevantly similar kind. It seems that if Lieutenant Baker's actions were the actions of a martyr, then additional moral agents might publicly support her decision and all similar decisions where a military professional makes conscientious sacrifices for the sake of a worthy belief, cause, or principle. While genuine martyrdom is not normally encouraged these days, it is not necessarily discouraged either. Many moral agents hold martyrs for various causes in high esteem. Other moral agents think martyrdom is a fool's errand. Some

⁵² The definition of martyr is taken from <<http://www.yourdictionary.com/ahd/m/m0128800.html>>.

moral agents might support Lieutenant Baker's futile efforts if they think that her actions were those of a martyr.⁵³

When I review Gert's ten questions for isolating the morally relevant features of a moral decision, it seems that these questions do not capture the possible moral relevancy of martyrdom. However, Gert says of his ten questions, "The answers to this list of questions seem to me to include all of the important morally relevant features."⁵⁴ If an action is an act of martyrdom and this fact can change whether some fully informed moral agent would publicly allow that act, then martyrdom is a morally relevant feature that Gert omits.

Even if Lieutenant Baker can accurately be classified as a martyr, it is another question whether her actions were or were not irrational. Certainly there can be wise martyrs and foolish martyrs. For Gert, the distinction between the two would depend on the compensating benefits to be realized by a particular act of martyrdom. Lieutenant Baker may have concluded that standing on principle provided sufficient compensating benefit to morally justify her actions, even if these actions achieved no tangible compensating benefits, such as changing the minds of other military professionals serving in this humanitarian mission and fostering an immediate and efficacious change in the rules of engagement.⁵⁵

The second step of Gert's decision procedure is, for Gert, morally decisive. This step calls for estimating what the consequences of publicly allowing or not allowing the proposed

⁵³ It is important to note that Lieutenant Baker's actions might also be interpreted as actions of civil disobedience. The reason I did not proceed with this line of reasoning is as follows. Civil disobedience is a refusal to obey civil laws in an effort to induce change in governmental policy or legislation, characterized by the use of passive resistance or other nonviolent means. Lieutenant Baker's actions were violent, i.e., she brandished a loaded weapon. Had she resigned her commission and encouraged other military professionals to do the same, that alternative would more accurately resemble civil disobedient behavior. In addition, I did not consider her behavior to be civilly disobedient because civil disobedience carries with it the implication that some level of success is possible. The futility of her actions suggested to me that her actions were more the actions of a martyr than those of a person engaged in civil disobedience.

⁵⁴ MNJ, p 227.

⁵⁵ This issue of martyrdom is complex and could be conceptually analyzed at length. I raise the issue here to point out that Gert's decision procedure may not have the conceptual tools to assess martyrdom cases, particularly when few or no compensating benefits are or should be foreseen. I surmise that Gert would view Lieutenant Baker's actions as irrational, but I am not sure.

violation would be. The consequences of martyrdom can be negative, i.e., cause riots and other violence. The consequences of martyrdom can also be positive on many levels. For example, it can rally an oppressed group's moral courage to press for a cessation of injustices. Also, martyrdom can achieve little either way except for the harm caused to the martyr and the pain caused to loved ones and other supporters. To the martyr, actual consequences may be irrelevant; the important thing is only that the belief, cause, or principle is honored through the martyr's actions. We do not know from this case how Lieutenant Baker estimated what the consequences of her actions would be.

If someone wants to make a martyr's sacrifice for a belief, cause, or principle, these sacrifices can be morally permissible, even if these sacrifices are ineffective in producing positive results. Gert's decision procedure does not address these issues. Military institutions are notoriously conservative institutions; they do not accept change easily. Martyrs can serve an important function of contributing to needed institutional change of the status quo. Institutions need to be shaken up from time to time. Unfortunately, it sometimes takes acts of martyrs to foster these needed institutional changes.⁵⁶

Excuses

Gert is careful to point out that some immoral actions are morally excusable. He identifies several morally relevant factors that help one to make judgments about whether a person is *excused* from moral responsibility for what they do. Morally responsible human beings are cognizant of the basic harms that all rational moral agents want to avoid. An individual who does not understand, e.g., that all people are vulnerable to harm is incapable of adequate moral reflection and subsequent judgment. An individual also must have a minimal level of intelligence

⁵⁶The case of Billy Mitchell comes to mind here. Billy Mitchell was Brigadier General and an aviation pioneer. His public criticism of government policies, in particular the government refusal to appreciate the vital future of military airpower in defiance of Army regulations, resulted in his court martial for "conduct prejudicial of good order and military discipline" and insubordination in Oct-Dec 1925. Found guilty and suspended for five years, Mitchell resigned his commission in Jan 1926. He continued to promote aviation and decry government inefficiencies until his death.

to be considered morally responsible for their actions. A person who cannot discriminate human beings from stuffed animals is irrational and probably not morally responsible for some of the things that they do. Persons who are morally responsible for their actions also require an adequate knowledge of the morally relevant facts of a situation. The fact that physicians in centuries past drained blood from their patients as a treatment for various diseases does not make those doctors morally responsible for the harms this treatment caused to thousands of sick patients. Likewise, a foreigner driving in another country who breaks an esoteric traffic law may be exempt from moral responsibility for violating the moral rule "Obey the law" as it applies in that country. Finally, persons may be excused from moral responsibility if they lack adequate volitional abilities.⁵⁷ For example, persons who cannot respond to reasonable incentives to act or to refrain from acting are not morally responsible for what they do. To Gert, these persons "do not really have a will."⁵⁸ For example, persons with Turret's Syndrome are not morally responsible for the offenses their outbursts cause to moral agents in their vicinity.

People provide *excuses* when they want to claim exemption from moral responsibility. Obviously, some excuses are good excuses and some are not. Unlike the characteristics mentioned in the last paragraph, some context-sensitive conditions partially or completely excuse persons from moral responsibility in particular situations. Four of these conditions are limited time, limited resources, varying degrees of duress, and epistemic limitations. These conditions are morally relevant since their presence or absence often changes whether a person is or is not morally accountable for what they do in a particular situation.⁵⁹ Each of these conditions occurs frequently in the crucible of military operations. It is easy to think of numerous examples of

⁵⁷ MNJ, p 23-25.

⁵⁸ MNJ, p 23.

⁵⁹ Medical triage situations are good examples. Military doctors are not held morally responsible for harms that result from prioritizing victims according to who has the best chance of survival. Commanders are not normally held morally responsible for harms that result from knowledge of enemy troop concentrations and weapons capabilities that they did not have.

actions that would warrant moral blame if a moral decision maker had more time, resources, knowledge, and a lower stress level.⁶⁰

In the military profession, human beings are often put in situations where they have to make moral decisions with limited time, resources, and knowledge, while under stresses that are so severe that they interfere with cognitive abilities. Ironically, soldiers are legally and morally required to perform actions that most have been taught and conditioned from birth to consider as immoral. This fact provides one reason why the military profession is governed by so many rules that constrain how and when to employ lethal force. This fact also explains why military operations create so much cognitive dissonance. Combat operations are psychologically traumatic because it is intuitively wrong to intentionally kill, injure and hurt to other human beings, as well as destroy others' personal property. Combat operations are also psychologically stressful because soldiers in combat know that other human beings are trying their best to kill, injure, and hurt them.⁶¹ These psychological traumas (from causing so much harm and from being in grave danger of receiving harm) result from two sources, the knowledge that killing, injuring, and hurting other moral agents without adequate justification is wrong, and the strong desire to avoid those same harms. Killing another human being, *even for an adequate reason*, is psychologically traumatic even if it is not immoral. Military operations raise the probability of killing and being killed enormously. Strong reasons are needed to morally justify placing other moral agents in these circumstances.

⁶⁰ If the reader needs an example, emergency room doctors are exempt from moral responsibility for triage decisions that they make in stressful emergency situations where there are limited resources, staff, and knowledge of patient medical histories. Good Samaritan laws protect persons from lawsuits who try yet fail to help victims in imminent danger. Moral agents intuitively know that ascriptions of moral responsibility fluctuate depending on the circumstances of the case.

⁶¹ This stress explains why it is a military practice to rotate troops out of danger after so many days under hostile fire. Human beings can only endure so much threat of imminent death and destruction before their physical and psychological systems shut down. The U.S. Marine Corps calls this condition the "2000 hour stare."

The severe psychological and physical stress of combat operations greatly increases the probability that military professionals will make costly moral errors. Soldiers may incorrectly discriminate when and how to use lethal force. Soldiers may lose the ability to adjust their behavior as they move in and out of combat and noncombat situations. Soldiers may lose their discipline and composure at times of severe stress and do things that are clearly wrong, such as acting disproportionately ruthless to retreating enemy troops or captured prisoners of war.

Some moral mistakes that military professionals make are *prima facie* wrong but morally excusable. Since the conditions of military operations result in more of these excusable moral mistakes being made, it is necessary to treat the issue of excuses in the context of military operations separately. Military professionals make excusable moral mistakes for a host of reasons, such as limited time, limited resources, limited knowledge, and extreme duress. Duress is a particularly problematic excusing condition because it can cause other excusing conditions such as insanity (even temporary), irrational recklessness, fits of irrational rage, catatonia, negligence, and other maladies that permanently or temporarily mar one's volitional abilities.⁶² When soldiers respond to duress in these ways, they become incompetent and dangerous.

One reason that military training places so much stress on discipline is that disciplined soldiers are less likely to lose their composure, become incompetent, and make moral mistakes, including excusable ones. Military leaders carry a significant burden of responsibility for taking steps to minimize the likelihood that these conditions will result and associated harms will be caused. Taking appropriate steps to minimize these costly moral mistakes is a professional duty of military leaders. Minimizing these mistakes requires strict discipline and real to life training regimens. Effective military leadership increases the probability for mission success and can prevent all sorts of unnecessary and avoidable harms to friendly forces, enemy forces, noncombatants, and property.

⁶² MNJ, p 23.

The following short case and the discussion that follows concern this important issue of moral excuses. This case provides an example of the types of actions that military professionals occasionally engage in that may qualify as morally excusable. Morally excusable actions are not condoned but they are understandable and therefore tolerated.

The Botched Surrender

C and D Companies are part of a larger U.S. expeditionary force to expel a military force from a South American country that has aggressively occupied a small U.S. island colony off the coast of their native homeland. C and D Companies are tasked with expelling enemy forces from a sparsely populated peninsula on this island. This peninsula is strategically important because it houses a small but militarily serviceable airfield. The peninsula also has one small community on a protected bay with water deep enough to host and provide protection for several U.S. Navy supply ships. The terrain on this peninsula is largely composed of rock outcroppings intermixed with short and sometimes thick coastal brush and pasture. The terrain is somewhat hilly but not mountainous. There are some ravines and a few small creeks to traverse. A few small sheep ranches owned by natives from this South American country dot the peninsula landscape.

After a low-level evening parachute drop using C-130 aircraft, C and D Companies separated and immediately proceeded to work their way down the peninsula toward the deep-water bay and community, clearing the area of enemy forces. Throughout the night the members of C and D Companies successfully fought several skirmishes with determined South American troops in cold, wet, and windy conditions. They are tired, cold, wet, hungry, and they have taken several casualties, one of which is the loved and respected Lieutenant Colonel in charge of their area of operations.

The occupying forces from the South American country are surrounding the deep-water bay to defend it from a forthcoming U.S.-led land-based assault. A few miles from this protected bay and the adjacent community, enemy troops are bivouacked in an old stone schoolhouse that guards the South American troops' right flank. C and D Companies have fought their way to within mortar and small arm's range of this schoolhouse. Communications from the Companies' group commander have been received instructing them to take the schoolhouse as soon as possible. If the schoolhouse is taken, the C and D Companies will be able to roll up the South American forces along the right flank.

Tired, wet, cold, and hungry, C and D Companies linked for a combined assault on the old stone schoolhouse. Enemy forces fought back fiercely for approximately two hours. Suddenly a white flag appeared from the direction of the schoolhouse. One of the young Lieutenants from D Company moved forward to accept the enemy surrender. An enemy soldier immediately shot the lieutenant, killing him instantly. Nevertheless, the comrades of the slain lieutenant fiercely opened up on the old stone schoolhouse, unleashing 66 mm rockets, rocket propelled grenades, and withering machine gun fire into the schoolhouse. It was quickly ablaze. No enemy survivors emerged.

This case invites two levels of analysis. Are the retaliatory actions of C and D Companies morally justifiable? If the answer is yes, how strong is that moral justification? If the answer is no, were they *excusable* under the circumstances? Were the actions of C and D Companies actions that fully informed moral agents should not normally condone, but nevertheless would excuse under the circumstances? My first goal in analyzing this case is to gather morally relevant facts using Gert's ten questions as a guide.

This is a short case description that leaves the reader wanting more morally relevant facts than the case provides. This is not unusual, since written case descriptions rarely provide an adequate description of the morally relevant facts. Was the surrender in this case a ruse or an honest action? Was the person who raised the white flag acting under orders or acting independently while the other soldiers in the schoolhouse were ignorant of his actions (e.g., they may have been in other rooms and hence blind to the presence of the flag)? Was the lieutenant who moved forward to accept the surrender and was subsequently killed ordered to do so or was he acting independently? Had there been other incidents in recent days of fighting where enemy soldiers used surrender flags as ruses only to kill soldiers who moved forward to accept them in good faith, or was this really an isolated accident?

For purposes of analysis, let's accept Fotion's argument that surrendering in combat is a unilateral speech act that does not require mutual agreement between the parties involved.⁶³ Generally speaking, surrenders must be accepted unless special mitigating circumstances warrant otherwise. We already know from the case description that this skirmish is militarily necessary to the larger battle and that the schoolhouse is strategically important for driving enemy forces from the peninsula in the coming days and establishing a safe port for navy supply ships.

⁶³ N. Fotion and G. Elfstrom, *Military Ethics: Guidelines for Peace and War*, Boston: Routledge & Kegan Paul, 1986, p 139-140. For Fotion and Elfstrom, surrendering is like telling someone that they are fired from a job. Being fired does not require the consent of the person fired. It is done when the words are spoken.

Each side in this skirmish is deliberately trying to eliminate the other's ability and will to fight. These goals involve trying to kill, injure, or force the surrender of the enemy. Causing these harms requires a more weighty moral justification than, e.g., a moral justification for an isolated instance of promise breaking. However, these soldiers, like most soldiers, are not empowered to choose the battles they fight but these soldiers do have some control over how and when they fight the battles that they are ordered to fight. The most prominent events in this case (and the most disturbing) are the killing of the lieutenant and what is apparently a vicious, but not necessarily disproportionate retaliatory response by the lieutenant's comrades.⁶⁴ It is apparent that the participants in this skirmish are lawful combatants, so the troops on both sides are not constrained by law or professional duty to not target each other. The morally dubious issues in this case are whether the killing of the lieutenant and the retaliatory response were morally justifiable, and if not, whether they were morally excusable under the circumstances.

It is important to attempt to understand the perceptions of the soldiers in this situation and how these perceptions probably influenced why and how this situation unfolded as it did. The lieutenant obviously believed that the surrender was not a ruse and his comrades apparently shared his beliefs.⁶⁵ However, the impulsiveness of C and D Companies' retaliatory response suggests that, once the lieutenant was shot, they subconsciously and automatically concluded that the surrender was a ruse rather than an accident. The intensity of the retaliatory response suggests that this was a close unit with strong bonds of loyalty to each other and the officers in charge.

⁶⁴ The act of engaging in a withering assault on the schoolhouse is not disproportionate under the circumstances. C and D Companies are bringing overwhelming force to bear against the enemy in order to destroy their ability and will to fight. Gert would argue that soldiers have role-specific duties to do this, provided that they do not commit unjustifiable violations of moral rules in the process. The disturbing aspect of this assault is their reason for it.

⁶⁵ This leads me to infer that, if this surrender was a ruse, it was an isolated instance. Otherwise, the lieutenant, assuming he was not ignorant of these ruses, would not have acted so foolishly.

Using surrender as a ruse is a particularly treacherous action. No soldiers who surrender want to be killed, injured, or tortured by the enemy they surrender to once they have declared themselves noncombatants. For Gert, the ubiquity of these desires makes the practice of accepting surrenders and treating prisoners humanely a professional *moral* rule, since treating prisoners in these ways violates each of the harms described in the first five moral rules, harms that all moral agents want to avoid unless a compensating benefit justifies enduring them.⁶⁶ Disregarding acts of surrender causes or greatly increases the probability that soldiers who subsequently surrender will suffer in ways that no soldiers want to experience or want people they care about to experience. When the lieutenant's comrades concluded that the surrender was a ruse, their immediate response suggests that their retaliatory response was a retributive act nestled in and obscured by the original combined assault on the schoolhouse, which was intended to achieve the same results had the soldiers in the schoolhouse not surrendered.

The individual who shot the lieutenant and the lieutenant's comrades who retaliated presumably did not have professional duties to act the way they did. I say "presumably" because important facts are missing from the case description that would make better moral assessments possible. We do not know whether or not the soldier who shot the lieutenant was ordered to do so. We also do not know if the shooter knew about the surrender flag. If he did, his actions were treacherous and immoral. If he did not, he may have concluded that the appearance of the lieutenant was the start of an assault that needed to be repulsed, making his death an unfortunate accident. We also do not know whether or not the lieutenant was ordered to move forward and accept the surrender under such precarious circumstances. His actions seem imprudent. At no time do we read that the troops in the schoolhouse were ordered by the lieutenant to come out with their hand up, to lay down their weapons, and to take other measures that would have

⁶⁶ It is also illegal to use surrenders as a ruse and to treat prisoners brutally.

clarified a very unclear situation. These missing facts contribute to the case description's reference to this event as most likely an accident in the fog of war rather than a treacherous ruse.

If the lieutenant's comrades believed that the surrender was a treacherous ruse, then it is possible that they believed that a strong retaliatory response was militarily necessary to deter the enemy from attempting similar ruses in the future. However, given the immediacy of their response to the lieutenant's shooting, it is reasonable to assume that these consequences were not strategically considered.⁶⁷ If in earlier engagements enemy forces had used surrenders as ruses to gain a tactical advantage, it might make this retaliatory response more justifiable, but would also provide evidence that the lieutenant's actions were foolish.⁶⁸ The retaliatory response is described in such a way that one wonders whether the retaliation wasted valuable ammunition that might be needed in other engagements in the near future.

If the members of C and D Companies did hastily conclude that the surrender was a ruse, it would be morally relevant if the lieutenant's comrades believed that their response was retributive. However, this belief would not necessarily make their retributive response on the schoolhouse morally justifiable. To Gert, punishment for weakly justifiable and unjustifiable violations of moral rules are reserved for institutions and/or individuals who fill specific social roles. For example, a parent has a role-specific duty to punish her children when they bite other children or have temper tantrums. Police have duties to deny criminals freedom.⁶⁹ In this

⁶⁷ Such reasoning can, I admit, take place almost automatically. I can imagine some members of C and D Companies reacting with an angry statement like, "Let's let the enemy know how we intend to respond to this sort of treachery."

⁶⁸ Lieutenants are notoriously inexperienced military professionals. It is a plausible alternative that he acted unilaterally without the supervision of personnel more experienced at dealing with the dangers that need to be minimized in order to prevent surrenders from turning into violent tragedies.

⁶⁹ MNJ, p 233. Gert is vague on this point. He says that the "infliction of harm [as in responses to immoral acts of war], like standard punishments, must have prevention of future violations [of moral rules] as its justification or it is simply an unjustified act of revenge." If the soldiers in this case had reason to believe that the surrender was a ruse, then it seems that their retaliation was morally justifiable for its deterrent effect. Then the important question would be whether C and D Companies had institutional authority to make these on-the-spot decisions at this low level in the heat of combat. Presumably they do not; these

situation, the members of C and D Companies did not have an analogously similar authority to punish enemy troops for *perceived* violations of the customs and laws of war. C and D Company did have a duty to accomplish the mission and to take care of each other according to law and regulations.⁷⁰ Executing punishment is normally reserved for other parties, e.g., those who craft and revise theater rules of engagement.

What is regrettable about this case is that the situation seems to have been avoidable or preventable if a few prudent measures had been employed. The lieutenant's actions were reckless or he was naïve (through his own fault or the fault of his leaders). If his actions were unilateral and represented a fatal error in judgment, then his death was the unavoidable result of incompetence. The lieutenant's superiors may have been incompetent for failing to train the lieutenant properly about risk-minimizing surrender procedures. Alternatively, the leaders of C and D Companies could have imposed restraint and ordered their troops to stand by while they sought terms for surrender. Then if the troops in the schoolhouse chose to accept those terms of surrender, they could have been instructed to come out in a submissive position, drop their weapons, and lay face down on the ground, thus minimizing the dangers to the troops in C and D Companies. The weapons of these surrendering troops could then be confiscated or destroyed. The leaders of C and D Companies could have insisted that the commander of the troops in the schoolhouse lead his subordinates in the surrender, minimizing the probability of dangerous

decisions are normally reserved for cooler heads higher up the chain of command. I cannot simply beat someone up for insulting me because I think it will deter future moral rule violations.

⁷⁰ This statement raises an interesting point. In this case the mission is accomplished regardless of whether the troops engaged in the retaliation believed they were acting out retribution or out of devotion to some other noble cause. Different soldiers no doubt have diverse reasons for fighting. What would have been more indicative of unjustifiable behavior would have been if the troops in the schoolhouse had put up another surrender flag and the members of C and D Company had ignored *that* flag and killed everyone. More caution would be in order but the new surrender gesture would have to be respected.

unilateral action.⁷¹ For Gert, alternatives like these are crucial because they reduce the probability that harms will result more than other alternatives do.

In such a situation, the surrendering troops must assume the risks of surrendering. They have the most to gain and the most to lose since they are presumably in imminent danger of being destroyed if they do not surrender very soon. Having the most to gain and lose, surrendering troops should take measures to show opposing forces that they are no longer a risk. Surrendering troops are declaring that they want to become noncombatants. Opposing forces are right to expect tangible evidence that surrendering troops no longer intend to behave as combatants.

Gert would conclude that this situation qualifies as an emergency, a morally relevant fact that he specifies in the last question he proposes for isolating morally relevant facts. The intense emotional responses of the retaliators would have been difficult to plan for because they are impossible to recreate in training environments. The members of C and D Companies were psychologically unprepared for the visceral reaction they would experience at seeing one of their young officers gunned down in what seemed like a deliberate act of treachery, even if they had been trained on surrender procedures prior to the campaign. Even if the members of C and D Companies were thoroughly trained in surrender procedures, they would not be familiar with how they would respond under these combat circumstances.

Since this case description does not specify the actions of the military leaders on either side (vice the lieutenant who was killed), it seems reasonable to infer that leaders and subordinates all participated in the retaliatory response. Had the leaders of C and D Companies ordered their troops to desist, the troops would have been faced with either retaliating anyway or desisting. If they retaliated anyway they would be disobeying a direct order, which could have serious legal consequences. If they desisted, the lives of most of the troops in the schoolhouse may have been spared and the mission still accomplished.

⁷¹ This is complicated by the fact the different armies often speak different languages. The white flag is supposed to transcend language, just as the Red Cross indicates a medical facility that isn't go be bombed.

The failure of the leaders of C and D Companies to restraint their troops in this situation raises the question of whether the retaliatory response was a direct result of incompetent leadership. The quality of a unit's leadership is absolutely crucial for maintaining unit discipline in emotionally charged circumstances. Good leadership prevents egregious harms that all moral agents want to avoid. The members of C and D Companies are individual moral agents with different ranks and responsibilities. The commissioned and noncommissioned officers of C and D Companies have a greater moral responsibility for the consequences of the retaliatory response in this case than the lowly privates who joined in the retributive act. If members of C and D Companies were morally responsible for their retaliatory response, it is most likely that the leaders are the ones who would be punished. However, while the leaders of C and D Companies bear a greater burden of moral responsibility for the consequences of the retaliatory response, this fact alone does not entail that their participation in the retaliation was not also morally excusable. It is not necessarily the case that military leaders are never morally excused for their actions.⁷²

Thus far I have considered morally relevant facts of this case using Gert's ten questions as a guide. For Gert, after analyzing the morally relevant facts, the next step involves making a moral judgment as to whether the retaliatory response of C and D Companies was morally justifiable or not. Would moral agents who are fully informed of the facts in this case (and lack thereof) publicly allow this sort of retaliatory response in this and all relevant similar situations, i.e., would they conclude that military professionals should be informed that retaliatory responses like these are morally permissible? I believe that the moral intuitions of fully informed moral agents would be mixed on this issue, making the practice only weakly justifiable (using Gert's language). Some would view the retaliatory response as a morally justifiable reprisal for shooting

⁷² It is also possible that the leaders in this case were only partially excused, whereas the subordinates were totally excused. Evidence for this view is found in the way that extenuating circumstances are sometimes considered which result in reduced punishments for immoral actions. In this case, if the leaders were considered partially excused for their retaliatory response and subsequently punished, their punishments would be lighter, such as nonjudicial punishment or letters of reprimand.

the lieutenant and others would consider it morally unjustifiable and symptomatic of a lack of military discipline.⁷³ However, so many morally relevant facts are unclear in this case that I think that these divergent assessments would be the result of vastly different speculations about the alleged facts of the case. Some would conclude that the surrender was clearly a ruse and others would see it as a tragic accident. These conclusions could be a decisive influence on whether fully informed moral agents would or would not think that allowing such on-the-scene reprisal decisions should be made an accepted military practice.

This case is helpful for illustrating the important role that Gert's publicity condition can play for assessing the moral justifiability of reprisals in these situations. Consider the consequences of publicly allowing retaliatory responses like these as an approved institutional policy encouraged and taught by U.S. military leaders. Would such a policy be one that all moral agents would consider morally justifiable? Would fully informed moral agents be willing to defend and implement a retaliation policy that empowered troops at the company level to make retaliation decisions in these sorts of emotionally charged battle situations? In this light, most moral agents who had time to estimate the consequences of this public policy and who had the authority to make these policies would conclude that the actions of C and D Companies were morally unacceptable. Empowering troops at the company level to make these retributive decisions would cause a disproportionate amount of harm relative to the harms such a policy would prevent and the benefits it would provide. Serious mistakes in moral judgment would be made in the field and discipline could be seriously undermined. Many unjustifiable retaliatory responses would result from bad judgments made by troops under severe internal and external stressors. The surrenders of our own troops would be ignored and our prisoners of war would be treated more harshly. The cascading negative diplomatic consequences of this policy could cause additional and even more serious harms.

⁷³ Many military professionals would also consider the lieutenant's foolish actions as morally unjustifiable or morally excusable depending on the facts.

However, even though Gert would most likely conclude that the retaliatory response of C and D Companies was morally unjustifiable or only very weakly justifiable, it remains a legitimate question whether or not their actions were *excusable* under the circumstances.⁷⁴ Several of the conditions for legitimate excuses seem to be in play in this case. The soldiers engaged in this skirmish are under significant combat duress that impairs their cognitive abilities. One of their young leaders has been gunned down before their eyes in what they perceive to be an act of deliberate treachery. The troops are cold, tired, hungry, and stressed out. The troops in this situation have significant epistemic limitations about the facts surrounding the appearance of the surrender flag, the motives of the enemy leaders, and the perceptions of the lieutenant's shooter. The members of C and D Company are analogous to persons who discover a perpetrator in the act of murdering a family member and who, in a fit of rage, attack that perpetrator and beat him to death, even after he is no longer a threat to the family.

Thus, even though Gert would probably consider the retaliatory response of C and D Companies morally unjustifiable or very weakly justifiable under the circumstances, the facts would lead him to conclude that their actions were also *morally excusable*. Their retaliatory response to the lieutenant's death exemplifies a practice that experienced military professionals with time to reflect on the consequences would not (or very rarely) publicly allow as an operational policy. The consequences of giving smaller units retaliatory discretion are largely negative ones. Since the retaliation of C and D Companies was understandable under the circumstances, the members of the unit do not merit disciplinary action. If the leaders of C and D

⁷⁴ Notice how Gert's assessment would conflict with the mixed intuitions of military leaders in this situation. Gert would argue that incorporating a publicity condition would help to clarify these intuitions and bring them into agreement that this retaliatory response was morally unjustifiable. For Gert, the two-step procedure can help to clarify the intuitions of moral agents morally judging a moral problem. Gert would think that employing the procedure would help many military leaders to see the long-term consequences of making these sorts of retaliatory responses an institutional policy. However, it is not necessarily the case that employing the two-step procedure would create unanimous agreement about the moral error of the members of C and D Companies. In this case, a few military leaders might stick to their intuitions and conclude that this retaliatory response was warranted. If this were the case, the retaliatory response would be weakly justifiable, but would be much more weakly justifiable than it was prior to

Companies are punished, their punishment should be light, taking into account the morally relevant facts surrounding the events that led to the retaliatory response. While their actions as leaders may not have been totally excused, their actions were at least partially excused under these circumstances. In the aftermath of these light punishments, higher-ranking military leaders should incorporate more training and instruction at some later date, particularly to young officers who might make the same fatal mistake as the unfortunate lieutenant in this case. Such training and instruction would help to minimize similar outcomes in future combat situations. The sort of retaliatory response engaged in by C and D Companies cannot be condoned, but actions like these *will* happen from time to time in the crucible of combat. Taking steps to minimize their occurrence is appropriate.

If any moral responsibility remains in this situation, it lies with the leaders of C and D Companies who did not take steps to restrain their troops, but apparently allowed the retaliation or actively participated in it. Had they been punished for ineffective leadership, I expect their punishments would have consisted of reprimands or other nonjudicial punishments placed in their military records. Since the retaliatory response in this case presumably resulted in the deaths of all troops in the schoolhouse, this punishment is obviously light relative to the harms the retaliation inflicted, and would be further evidence that the action was morally excusable.

CHAPTER 6 CONCLUSION

Gert's two-step decision procedure has not been systematically used until now to assess concrete military ethics cases. The cases that I selected provide but a small sample of the types of moral decisions that American military professionals face in the performance of their diverse and highly specialized duties. However, the cases I selected are sufficiently diverse to show that Gert's decision procedure can be used in a myriad of contexts to assess the moral decisions of American military professionals of different ranks, services, and technical specialties.

In Chapter 5 I analyzed concrete military ethics cases the way that I think Gert would have analyzed them given his description of the common moral system and the two-step decision procedure. I followed a pattern similar to the one that Gert uses in his analyses of concrete medical ethics cases, a few of which I discussed and assessed in Chapter 4. I did not proceed in cookie cutter fashion to answer each applicable question for isolating morally relevant facts, and then methodically proceed to the morally decisive second step of the decision procedure. I let Gert's procedure *guide* rather than prescribe my analysis of concrete military cases. This way of using Gert's decision procedure is appropriate for two reasons. Gert explicitly says that the decision procedure is a guide and not an algorithm for making moral decisions. None of the ten questions for isolating morally relevant facts applies to every case. And each case does not necessarily have only one morally acceptable alternative. The two-step decision procedure merely limits the range of moral options available to moral agents in concrete situations.

More importantly though, using Gert's decision procedure as an guide for concrete military ethics decisions in controversial cases is appropriate because Gert's moral theory is, he admits, only a description of the common moral system that moral agents implicitly use to make moral decisions and judgments in a way that is similar to how they use the grammatical system to

speak a language. Gert wants to describe and justify the system that people use, not describe and justify an improved system that moral agents should convert to. As a result, I think it is important to analyze concrete military cases in moral language that is already familiar to American military professionals, but in a way that implicitly uses the two-step decision procedure that Gert provides for framing the morally acceptable alternatives available to moral actors in particular military contexts.

In order to use language that is familiar to American military professionals, it was necessary to employ concepts that military professionals actually use to make moral decisions in particular cases. In this chapter I provided a list of those familiar concepts that I think are relevant to all moral decisions in American professional military ethics. I then described how these concepts are grounded in the common moral system that Gert describes. This step was necessary so that I could employ the concepts without begging the question or contradicting the very theory and decision procedure that I employed. Gert follows a similar method in his analyses of medical ethics cases.

I do not claim that my list of concepts is necessarily complete. I only claim that one or more of these concepts are always relevant to a moral decision made by American military professionals.

In each of the cases that I analyzed in Chapter 5, I followed the two-step procedure *generally*. I first isolated morally relevant facts using Gert's ten questions and the crucial concepts as a guide; and second, I considered what the probable consequences of publicly allowing or not allowing the violation of moral rules under consideration would be. I used my estimates of these probable consequences to extrapolate whether fully informed moral agents in similar circumstances would accept or reject the moral decision being considered. I also followed this procedure in discussing the case that I argued involved the important issue of moral excuses. In "The Case of the Botched Surrender" I considered whether the retaliatory actions of the moral

actors attached to C and D Companies were morally justifiable or not, and if they were not, then whether or not they were excusable under the circumstances.¹

Tying It Together

American military professionals can draw moral guidance from a plethora of sources. In Chapter 2 I categorized these sources as *official documents* and *literature of aspiration and evaluation*. Of these two the official documents are the most important, because within these documents are contained the laws, codes, regulations, and policies that structure the American military profession and establish each member's moral and legal obligations as American military professionals. These documents are numerous, diffuse, and often prohibitively lengthy. Sometimes these documents provide inconsistent moral guidance or fail to provide the moral guidance that American military professionals need.

Most American military professionals are only vaguely familiar with the content of these documents with the exception of a few specific laws and regulations that govern how they are to perform their particular duties. As a certified contracting officer for the U.S. Air Force, I know the content of specific regulations important to minimizing conflicts of interest in the performance of my professional duties, such as limits on the dollar value of contractor gifts to military personnel and restrictions on post-service employment with government contractors. I am also familiar with laws requiring competitive bidding on contracts and the procedures for setting aside some contracts for small businesses, small disadvantaged businesses owned by persons with disabilities, and small businesses owned by representatives of particular minority groups.²

¹ Refer back to "The Case of the Botched Surrender" in chapter 5 if necessary.

² These regulations are morally relevant because they minimize harms that would result if contracting officers knew they were not in force. Contracting officers might, e.g., accept large gifts in return for contract awards. The laws governing competition in government contracting have the goal of preventing monopolistic business practices, diversifying the business environment, lowering prices, and employing competent members of the society who might otherwise be unfairly disadvantaged.

However, few military personnel know the regulations of a more general ethical nature, or if they are aware of these regulations, they are generally unfamiliar with their content. For example, few military personnel are familiar with the Joint Ethics Regulation (JER).³ Of those American military professionals who are familiar with the JER, very few know the moral principles this regulation prescribes. In my fifteen years as a U.S. Air Force officer, I have never met a colleague who, if he or she knew that the Joint Ethics Regulation existed, also knew a substantial amount of its content, or knew that it contains a moral decision procedure.⁴

In contrast, according to Gert all moral agents are familiar with the actions that the moral rules proscribe and, if they are conscientious, implicitly use them to order their moral lives. Military professionals are moral agents. Therefore, if Gert is correct, all military professionals are familiar with and are able to use the common moral system to make moral decisions and judgments. For Gert, the challenge has been to describe the common moral system in language that all moral agents, including the most unsophisticated military service members, can understand and subsequently employ more explicitly and effectively in complex and controversial cases.

I do not intend to suggest that Gert's description of the common moral system and his two-step decision procedure is a recommended replacement for the official documents discussed in Chapter 2. Gert would disagree with me if this were my goal. On the contrary, Gert's moral theory and decision procedure helps to explain and to clarify the moral purpose of these documents as an integral part of the common moral system. The official documents prescribe the laws and duties that govern members of the American military profession. Obeying the laws and performing the professional duties described in these documents is morally required by the

³ The *Joint Ethics Regulation*, or JER, is (DoD 5500.7-R, 30 Aug 1993). Full text of the JER is available online at <http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/>.

⁴ JER, op. cit., p 158-159. This text is also taken from <http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/>.

common moral system. The moral rules "Obey the law" and "Do your duty" are universal moral rules. Insofar as obeying the laws and performing the duties described in these official documents do not result in unjustifiable violations of moral rules (intended or merely foreseeable), American military professionals are morally required to comply with them. Where the official documents give conflicting direction on how to solve a moral problem, the common moral system that Gert describes, particularly the two-step decision procedure can be a useful tool for working out solutions in complex cases. For Gert, morality begins with the status quo. If an American military professional makes a moral decision that goes against the moral prescriptions contained in the official documents, the burden of proof is on that military professional to morally justify that decision and to accept the consequences of that decision.

Gert's description of the common moral system also performs the important task of clarifying an ambiguity in the official documents (and the literature of aspiration and evaluation) that is problematic. The official documents do not draw the clear but needed distinction between moral rules and moral ideals. It is important for American military professionals to understand and appreciate the difference between actions that are required by law and duty and actions that should only be encouraged, i.e., exceed minimum standards of performance. Military professionals should know that exceeding the minimum standards does have its professional and personal rewards, but that failure to exceed these standards is not a moral failure *per se*. If every military professional could produce exceptional performance, this performance would cease to be exceptional. Gert is very clear on the distinction between the moral rules and the moral ideals. This distinction is valuable for communicating realistic expectations to military subordinates. Obeying the laws of the military profession and performing one's duties in an acceptable manner are sufficient conditions for honorable military service. There should be no shame in serving that way, and one is not morally culpable for failing to perform above and beyond the call of duty and the requirements of the law.

Gert's moral theory also clarifies an ambiguity in both the official documents and the literature of aspiration and evaluation concerning the place of the moral virtues in the military profession.⁵ I think Gert argues effectively that moral virtues are not fundamental in the common moral system, of which the American military profession is a part. Writers who argue that the military virtues are fundamental cannot effectively manage two problems; first, the fact that the moral virtues can be used to serve evil ends, and second, that there is no such thing as an ideal moral exemplar to always point to and say, "Imitate her!" Without the limiting constraints of the universal moral rules, people who have the moral virtues can cause much more evil than people who do not have these virtues. As long as the virtues discussed in the official documents and the literature of aspiration and evaluation are not used to commit unjustifiable violations of moral rules, their expression is morally acceptable and often commendable. While there are no perfect moral exemplars to emulate, the moral rules are provide concrete moral limits to behavior. For Gert, all moral agents implicitly know and understand what these rules are. Gert's moral theory acknowledges the importance of the virtues in the military profession while recognizing their appropriate place subsumed under the moral rules.

Fotion and Elfstrom, Axinn, Gabriel, and Hartle Revisited

In Chapter 2 under the *literature of aspiration and evaluation* I discussed and critiqued the systematic professional military ethics of Fotion and Elfstrom, Axinn, Gabriel, and Hartle, to show that some American moral philosophers have already responded to a perceived need to provide a philosophical justification for or a revision of American professional military ethics. I will now argue that Gert's description of the common moral system provides a more accurate and more useful moral theoretical foundation for American professional military ethics than any of these earlier attempts.

⁵ This ambiguity is more prevalent in the literature of aspiration and evaluation.

Gert's moral theory is a better and more useful foundation for American professional military ethics than Fotion and Elfstrom's consequentialism for the following reasons. When the rules described in the official documents conflict, Fotion and Elfstrom's military ethics takes the position that complex and controversial moral decisions (where established rules conflict) should be made according to which course of action maximizes preference satisfaction after careful consideration of logic and the facts. The first problem with this view is that the preferences of the moral agents involved in a particular situation are impossible to calculate. This criticism is not new, but it is significant.

Secondly, even if preferences could be known accurately, when the laws, rules, regulations, policies, international treaties, and conventions in the official documents conflict, the morally preferable decision *may not* be the decision that maximizes preference satisfaction. Professional duty sometimes requires choosing the alternative that does not maximize preference satisfaction.⁶

For example, soldiers have duties to each other and to innocent civilians in occupied territory. Suppose a patrol of ten U.S. soldiers is responding to another patrol that has been ambushed. Upon arrival, the patrol notices that a U.S. soldier is badly injured at the top of a small ridgeline. He is bleeding badly and will die in a few minutes without immediate medical attention. However, between the patrol and the injured soldier is a minefield. Nearby a farmer watches the situation unfold. Suppose the lieutenant has good reason to believe that this farmer knows how to negotiate this minefield, and thus instructs his interpreter to tell the farmer to show them him to get through it safely. The farmer refuses. Immediately the lieutenant puts a gun to the farmer's head and tells the interpreter to tell the farmer that unless he tells him how to reach the top of the ridgeline safely that he will be killed.

⁶ This position also dooms Fotion and Elfstrom to irrelevance as a view that would influence the moral decisions of American military professionals. If a moral theory and the official documents conflict, military professionals and their civilian leaders are going to side with the official documents and use them as a baseline, not a moral theory that conflicts with them.

In this case, Fotion and Elfstrom would argue that the actions of the lieutenant were morally required if the balance of preference satisfaction (presumably) supported threatening this farmer in this way. Presumably the preferences of the lieutenant, the injured soldier on the ridgeline, and the U.S. troops in the patrol would make the threat to the farmer warranted.⁷ Is maximizing preference satisfaction a sufficient condition for determining that it is morally required to override the innocent farmer's right to protection under international law? Not necessarily. According to Gert, we have to ask what the estimated consequences would be of *publicly* allowing behavior similar to the lieutenant's behavior in this case. Fully informed moral agents (experienced U.S. military professionals) would not accept this lieutenant's behavior as an accepted policy for patrol leaders. Human beings are fallible. Under the rigors of combat conditions, many mistakes in moral judgment would be made and many innocent civilians would be killed or maimed, many under conditions less serious than this one.

For Fotion and Elfstrom, it would presumably bolster their argument if the actions of the lieutenant would remain a secret to himself and the immediate group of moral agents around him. However, for Gert morality is a public system and moral justifiability requires publicity. If secrecy were allowed to be a morally relevant fact that influences calculations of preference satisfaction in moral agents affected by a particular case, then morality would no longer be a public system.⁸ Clandestine groups could use secrecy to twist morality to their own purposes. Fotion and Elfstrom's military ethics also lacks the conceptual tools to effectively deal with this problem without eliciting counterintuitive results. Their response to counterintuitive results is to argue that, if the intuitions of common morality conflict with the results provided by applying their moral theory to a particular military case, then the result provided by the application of their

⁷ Let us assume that this farmer has no family or significant others.

⁸ The problem with secrecy is evident in the practice of cheating. Allowing secrecy would make many cases of cheating morally justifiable, since the preference satisfaction would warrant cheating when the benefits are good and no one will find out. A publicity condition corrects these problems and provides a description of common morality that is more accurate.

moral theory takes precedence in moral decision making. In contrast, Gert's argues that these counterintuitive results are a concrete sign of moral theoretical failure, i.e., a failure to describe the common moral system correctly. In this way, Gert effectively deals with the problem of moral theory producing counterintuitive moral requirements. This approach makes Gert's theory and decision procedure better for making controversial moral decisions that do not contradict the official documents that I discussed in Chapter 2. The lieutenant in the aforementioned situation has committed a war crime. The lieutenant's mission does not morally justify disregarding international law in this and relevantly similar cases that share the same morally relevant facts. The injured soldier is a lawful combatant and the farmer is not.

Thus, when rules conflict and preference satisfaction is the only morally relevant feature for making a difficult decision, Fotion and Elfstrom are taking a position that contradicts the official documents that define and structure the American military profession. The rules cannot be overridden simply when the presumed balance of preference satisfaction warrants it. However, it is important to point out that Fotion and Elfstrom's view is not problematic if we assume that they have the goal of replacing or amending these official documents with their particular consequentialist interpretation of military ethics. Fotion and Elfstrom do not state this goal explicitly, but they propose a moral decision procedure that includes four specific codes grounded in Hare's consequentialist theory.⁹ These codes are to be used to guide moral decision-making in complex and controversial cases. They propose a creedal code, a fighting code, an internal code, and a prisoners' code.¹⁰

For Fotion and Elfstrom, the creedal code would be a lofty statement of *ideals* phrased like a slogan or an easy-to-memorize list of virtues that belong to the exemplary service

⁹ See R.M. Hare, *Moral Thinking: Its Method, Levels, and Point*, Oxford: Clarendon Press, 1981.

¹⁰ N. Fotion and G. Elfstrom, *Military Ethics: Guidelines for Peace and War*. Boston: Routledge & Kegan Paul, 1986, p 76-79.

member.¹¹ Such codes are already in place, e.g., the U.S. Air Force's core values of integrity first, service before self, and excellence in all we do. The fighting code would be a prescriptive set of *rules* that govern the employment of lethal force, with rules about topics such as obeying orders, caring for subordinates, and protection of noncombatants. Fotion and Elfstrom do not specifically discuss what they would put in this code, but they imply that the content of this code would mirror the prescriptions dealing with this subject that are already contained in the official documents. Fotion and Elfstrom also propose an internal code to prescribe *rules* for governing relationships between military professionals in the same military organization. This code is most emphasized during peacetime and has a crucial influence on how military professionals will behave in future combat conditions. These rules cover topics like giving and receiving orders, abuse, fair treatment, and rules for performing one's duties in an acceptable manner, to include rules like grooming standards and proper uniform wear. To Fotion and Elfstrom, many of these rules would overlap with the rules contained in the fighting code. Finally, Fotion and Elfstrom propose a prisoner's code, which they contend should contain information like that which is already contained in the U.S. Armed Forces Code of Conduct.¹² For Fotion and Elfstrom, each of these codes would be subsumed under a military ethics grounded in Hare's consequentialism. At the intuitive level, these codes would describe rules would be morally required until a conflict of those same rules prompted the need for critical thought that would be based on logic and the one morally relevant fact, maximizing preference satisfaction. Since Fotion and Elfstrom ultimately think that there is only one fundamental morally relevant fact, it is not surprising that they fail to propose questions for isolating morally relevant facts in a controversial case.

¹¹ This list of virtues would, I assume, be similar to the "Scout Law" of the Boy Scouts of America, which is recited at the start of every Boy Scout troop meeting. "A scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent." See *Boy Scout Handbook*, 11th Edition, Boy Scouts of America, 2000.

¹² See chapter 2, footnote 40.

Beyond describing in general terms what these codes are and what type of general information they would contain, Fotion and Elfstrom offer little in the way of concrete advice for making moral decisions in concrete cases when moral intuitions are unclear (established rules conflict). They do observe that the latitude granted to military personnel to engage in critical reflection will often be a function of rank and responsibility. The duties of lower ranking enlisted troops will nearly always entail conditioned obedience to established rules.

Finally, although Fotion and Elfstrom suggest that these four codes should guide moral decision making in military contexts, they readily admit that grounding military ethic in Hare's consequentialism would occasionally result in counterintuitive moral obligations in concrete cases. They conclude that having a decision procedure that sometimes gives counterintuitive results is better than having no decision procedure at all.¹³ It seems that Fotion and Elfstrom really do, if only implicitly, want to replace the American professional military ethic with a new and improved moral system. For Gert, these counterintuitive obligations are empirical evidence that Fotion and Elfstrom inaccurately describe the common moral system, assuming that their goal is not to replace that system with a system of their own creation.

Gert provides a decision procedure that, like the official documents, is rule-centered. Obeying the rules described in the official documents is required by the moral rules "Do your duty" and "Obey the law" unless an exception is morally justifiable, i.e., is one that fully informed moral agents would publicly allow after careful consideration of the morally relevant facts. Unlike Fotion and Elfstrom, Gert's moral theory and the official documents do not conflict but rather complement each other, because Gert would not want to replace the American professional military ethic with a new and improved version that he thinks is superior. Rather, Gert would describe and justify the American professional military ethic as currently practiced using familiar concepts that are grounded in the universal moral rules. He would argue that

¹³ Fotion and Elfstrom, *op. cit.*, p 74.

military professionals implicitly use his decision procedure already, and that they can use it explicitly to guide their moral decision-making when they are faced with an unusually complex or controversial moral decision.

Axinn's military ethics is problematic in other ways. It is too idealistic to be useful. Based on Kant's deontological system, Axinn's military ethic is only vaguely similar to Gert's in two ways. It is based on rules and it emphasizes the importance of a publicity condition to making moral decisions. However, unlike Gert, Axinn adapts Kant's view that if moral rules are universal, they are also absolute. Consequently, the moral rules that govern the military profession are also absolute insofar as they respect the absolute dignity of human beings as moral agents. For Axinn, military professionals must follow these rules regardless of the cost, making sacrifices for the sake of the right principles the preeminent military virtue. This view puts Axinn at a disadvantage from the start, since all moral rules have justifiable exceptions and moral agents know this fact. For Gert, Axinn's counterintuitive results would, like Fotion and Elfstrom's, be viewed as an indication of moral theoretical failure.

Gert's theory is also superior to Axinn's theory in that Gert provides a decision procedure, whereas Axinn does not. Axinn provides little specific guidance for isolating morally relevant facts in order to frame a moral decision in concrete cases. Thus, using Kant's language, he provides no guidance for how to frame one's maxims for action. This problem is particularly evident in "The Case of U.S. Army Ranger Captain," which I analyzed in Chapter 5. Axinn's military ethics focuses entirely on theoretical considerations associated with morality *and war*. For Axinn, the proper goal of war is to win without committing war crimes, which he views as necessarily an impediment to creating a lasting peace. Committing war crimes violates the categorical imperative; thus, all violations of the customary and positive international laws are moral violations of absolute duties. For Axinn, all military personnel (and civilians) need to be trained in these customary and positive international laws so that they will know these absolutely binding moral rules are.

The U.S. Army Ranger Captain can obtain little moral guidance from Axinn regarding whether to train his rangers in extreme weather conditions or to curtail that training. Axinn makes no mention of a method for assessing the harms avoided, prevented, or caused by different alternatives. He makes no mention of emergency conditions that might justify an exception to the rules. And while Axinn observes that soldiers are human beings who deserve dignity or respect, he offers nothing in the way of advice to the Captain for determining whether training or curtailing training best respects the human dignity of his subordinates. The only thing that seems clear from Axinn's account of military ethics is that *if* either training or curtailing training were the morally obligatory choice for the Captain to make, then he and his troops would be required to do that act, regardless of the sacrifices involved.¹⁴

In contrast to Axinn, Gert's list of ten questions for isolating morally relevant facts is a simple and helpful list that is available to guide the Ranger Captain's determination of whether a proposed violation of moral rules is morally justifiable or not. The Captain may not be familiar with the customary and positive international laws that Axinn argues are grounded in respect for human dignity, which he thinks Kant's moral theory effectively captures. Thus, even if the Ranger Captain is ignorant of these laws, he is morally responsible for his decisions based on these absolute rules anyway. Gert's description of common morality has the advantage, assuming that it is accurate, of describing what moral agents like our Ranger Captain already use when they make moral decisions. Even though the Ranger Captain is most likely not familiar with Gert's explicit theory, he employs that theory like he employs the grammatical system when he makes moral decisions by considering morally relevant facts and making a decision based on those facts and the professional rules that he is trained in. Gert's decision procedure is simple and easy to learn for moral agents who want additional guidance for making moral decisions in controversial

¹⁴ One bit of moral decision-making advice is implied by Axinn's military ethics that may help our Ranger Captain. If the Ranger Captain knows that the training will significantly help to prevent his troops from committing war crimes in a future campaign against an enemy, then presumably our Captain is morally obligated to train.

decisions like the one the Ranger Captain is faced with. Since morality is an informal public system that all moral agents know and understand, the Ranger Captain is responsible for his moral failures and defending the moral decisions he makes that are only weakly justifiable.

Finally Gert's theory is superior to Axinn's because Axinn ignores important facts about human motivation. Moral agents will occasionally but rarely sacrifice even life itself out of dedication to principles *alone*. It is unrealistic for Axinn to require military professionals to be motivated this way exclusively. Yet for Axinn this motivation is the penultimate professional military duty. In the crucible of military operations, military professionals rarely sacrifice for the sake of principle alone, but for other worthy objects such as honor, comrades, family, and country. In contrast, Gert aptly recognizes that the goal of morality is to reduce harm for oneself and those that one cares about. His description of the common moral system more adequately considers those harms that really do motivate military professionals to behave morally in extreme conditions.

Gabriel's professional military ethics is virtue-centered. The virtues, however, can be used as instruments for evil ends. Also, since all moral agents are fallible, there is no moral agent that anyone can always point to and say, "Emulate her!" On a practical note, which is crucial for providing moral guidance to military professionals confronted with a difficult moral decision, Gabriel's military ethics suffers from having no decision procedure to assist military professionals with complex and controversial moral decisions. Presumably, Gabriel thinks that teaching the virtues to recruits and motivating them with inspiring rhetoric is sufficient to guard military professionals from making bad moral decisions and judgments. Teaching the virtues to recruits and motivating them with inspiring rhetoric is important and perhaps necessary for a military force that is committed to moral excellence, but it is not sufficient. Exclusively taking this approach to the moral education of military personnel provides no guidance for what to do when virtues are in conflict in a particular case.

For example, consider the virtue of loyalty, which I discuss at some length in Chapter five. Loyalties can conflict in agonizing ways. At the U.S. military academies, cadets occasionally have moral conflicts between their loyalty to the cadet honor code and their loyalty to their classmates, many of whom are their good friends. Gabriel's military ethics offers no guidance for dealing with these moral conflicts. Learning about loyalty and hearing inspiring examples of loyalty in action are insufficient for resolving these difficult moral conundrums. Military professionals appreciate a moral decision procedure most acutely when the decision they are faced with is difficult. Loyalty to the honor code and loyalty to one's comrades are both critically important in military training environments like the U.S. Air Force Academy. Gert provides a decision procedure to guide deliberation about these cases. Gabriel does not.

Gabriel does propose a code of conduct for military professionals that he may implicitly intend to provide moral decision making guidance for military professionals. I am being charitable because Gabriel does not explicitly call this code a decision procedure. It reads like a list of slogans.¹⁵ Even if we charitably consider this code a decision procedure, it is too long and vague to be useful. Its ten provisions are packed with lengthy sentences that emphasize military virtues like honesty and integrity. This code provides no guidance for isolating morally relevant facts and comparing morally acceptable alternatives in concrete situations. The provisions in Gabriel's code are not bad provisions; qualities like honesty and integrity are obviously good virtues for American military professionals to have. Gabriel's provisions simply do not provide the sort of decision-making guidance that military professionals need in complex and controversial cases. The U.S. military academy cadet wrestling with whether to demonstrate loyalty to the honor code or to a classmate and friend receives little useful guidance from this list of platitudes. Gert's decision procedure would provide this cadet with important things to consider, such as the gravity of the friend's honor violation, the probable consequences of

¹⁵ See Gabriel's code in Chapter 2, pages 71-72.

reporting or not reporting it, the alternatives available (such as encouraging the friend to self-report), and whether the friend's violation was intentional or only foreseen.

Likewise, in "The Case of the Ship Captain" the captain also faces a difficult moral decision that Gabriel's code (decision procedure?) fails to provide guidance for. The ship Captain has several things to consider under the broad umbrella captured by the moral rules "Obey the law" and "Do your duty." Gabriel's code offers the Captain little guidance to help him determine whether to meet with the minority group or with its leaders only. It provides no advice for how to plan the meeting if he chooses to have it. And it provides no guidance for how to prudently engage the involvement of subordinate officers aboard ship.

For Hartle, the American professional military ethic is grounded in fundamental values gleaned from the official documents that I discuss in Chapter 2.¹⁶ These values are grounded in the rule of law as framed by the U.S. Constitution, which includes (without contradiction) the international laws and treaties the U.S. is signatory to. The main moral justification that Hartle gives for these values is that the U.S. Constitution respects fundamental human rights.

Hartle's American professional military ethics shares a few important features with Gert's description of common morality. Hartle does not want to replace the duties and laws described in the official documents. Instead, he wants to provide a justification for their moral authority. In this way Hartle's goal for the official documents and fundamental American values is similar to Gert's goal of providing a description and a justification for the common moral system.

Hartle's military ethics has a few problems that I think Gert's theory can overcome for American professional military ethics. Hartle implicitly accepts the paradox that in order to defend constitutional principles that respect human rights, military professionals must sacrifice some of their own human rights. What Hartle needs that Gert provides is a story of how governments are morally justified in taking away the freedoms of some of its citizens to fulfill

moral and utilitarian ideals, i.e., prevent worse harms and promote goods. Telling this story requires bringing the moral relevancy of consequences into play in a way that Hartle fails to do. Even with an all-volunteer force, American military professionals are frequently put in circumstances that they desperately want to avoid but are legally and morally obligated to endure. Hartle merely accepts this paradox as a fact of the military profession; Gert provides a plausible explanation for it.

The distinction between Gert and Hartle on this paradox is illustrated in "The Case of the Conscientious Lieutenant." Lieutenant Baker's constitutional rights are obviously restricted while she is serving in this Central American country. Her freedom of movement is severely restricted in that she is restricted to the U.S. military compound unless she meets very specific conditions prescribed by the rules of engagement. These rules of engagement are legal orders. Lieutenant Baker is not only obligated by military law to obey them, she is bound by the moral rules "Obey the law" and "Do your duty" to obey them. According to Hartle, the U.S. Constitution and fundamental American values that support this document provide all the moral justification that is needed to restrict Lieutenant Baker's freedom of movement, not to mention other restrictions on her rights, such as free political speech.¹⁷ These restrictions are simply a fact of American military life.

For Gert, these restrictions are grounded in the common moral system in virtue of the fact that, in order for governments to function, they must be able, when situations warrant, to violate the universal moral rules "Do not deny freedom" and "Do not deny pleasure" in order to fulfill moral and utilitarian ideals. Governments have to deny their citizens of some freedom to

¹⁶ I list the seven categories of these documents in the section "Official Documents" in Chapter 2.

¹⁷ These restrictions play out in various ways depending on the military mission. During the first Gulf War in 1991-1992, American service personnel were prohibited by the rules of engagement from drinking alcoholic beverages in order to smooth tense diplomatic relations with the Saudis.

interpret the moral rules in order to govern effectively at all.¹⁸ This authority is crucial in order to prevent significant harms that would certainly occur if individuals were allowed to interpret the moral rules as they see fit. This authority is not restricted to the American government; it applies to all governments, since the common moral system applies to all governments. With the exception of extreme anarchists, moral agents know and accept that governments have to restrict some liberty in order to prevent worse harms and to promote goods like education and the arts. In Lieutenant Baker's case, her restriction to post as articulated in the rules of engagement is a morally justifiable exercise of government authority over its military professionals. The resulting harms that would ensue if American military personnel were free to act according to their own interpretations of the moral rules and ideals could be severe. Since the restrictions on Lieutenant Baker's freedom of movement commit no unjustifiable violations of moral rules, she has a professional duty to obey these rules. If her proposed violation of these rules is weakly justifiable, she may proceed, but she is responsible for the consequence (punishment) that result from her violation.

Hartle also comes up short compared to Gert on the issue of making moral decisions when the prescriptions written in the official documents conflict, particularly when the rights of different moral agents conflict in a concrete case. Hartle has no answer for this problem because he offers no decision procedure to weigh the conflicting but morally acceptable alternatives that moral agents often have in a particular situation, such as occurs in "The Case of the U.S. Army Ranger Captain." For Hartle, military professionals are obligated to perform their duties. When these duties conflict, e.g., when the needs of the mission conflict with guarding the welfare of subordinates, Hartle asserts that decisions must be limited to those decisions that are "not contrary to the values of American society and the moral principles reflected in the

¹⁸ Bernard Gert, *Morality: Its Nature and Justification*, New York: Oxford University Press, 1998, p 364-367. Hereafter I refer to this work with "MNJ" followed by the relevant page numbers.

Constitution.”¹⁹ This advice is of little help to the Ranger Captain deciding whether or not to train in severe weather. He must balance competing duties and make an informed decision based on the morally relevant facts and his interpretation of the harms and benefits at stake. A decision procedure like the one that Gert provides is a useful guide in these cases.

Finally, Hartle, unlike Gert, expresses overconfidence in the constitutional principles that he argues ought to be the primary motivation for military service. He seems to ascribe the same respect for the official documents that Gert ascribes to the common moral system. The official documents, however, are political documents that have been used, interpreted, and retooled over the years to serve a variety of ends, some of them good, and some of them sinister. The U.S. Constitution and its supporting official documents are human creations. Morality, for Gert, transcends nations, cultures, and politics. It is described, not created. Morality is not exclusively political. It is personal and universal.²⁰ Only insofar as the official documents are not used to commit unjustifiable violations of universal moral rules are these documents morally authoritative for defining and structuring duties of American military professionals.

Gert's Potential Contributions to American Professional Military Ethics

Gert's goal is to describe the common moral system and the decision procedure that moral agents implicitly use to make moral decisions and judgments. The official documents that define and structure the American military profession fit nicely into the moral system that Gert describes. These documents are directly grounded in the common moral system through the moral rules “Do your duty” and “Obey the law.” The common moral system limits these obligations to duty and law to those actions that do not commit unjustifiable violations of

¹⁹ Anthony E. Hartle, *Moral Issues in Military Decision Making*, Lawrence: University of Kansas Press, 1989, p 148. Hartle attempts to show that these principles and values are nicely explained in places like Army regulations and the various sources of international law. Hence, these regulations and laws deserve allegiance as an exhaustive explanation and interpretation of American values and constitutionally grounded moral principles.

²⁰ MNJ, p 113-114, 109.

universal moral rules. Thus, insofar as Gert's description of the common moral system is accurate, his theory has the moral theoretical tools to successfully integrate the American professional military ethic into a universal moral system grounded in facts about human nature. In this regard I think Gert's moral theory can be at least as successful when applied to American professional military ethics as it is in medical ethics.

Gert's moral theory is an improvement over the military ethics of Fotion and Elfstrom, Axinn, Gabriel, and Hartle. This is a significant result, as these writers are the most systematic American moral philosophers of professional military ethics to date. It is quite another question to consider whether a Gertian American professional military ethics can stand on its own merits. Does Gert's moral theory and decision procedure improve on the moral decision-making guidance found in the official documents? In limited ways, it does. A practical benefit of Gert's moral theory and decision procedure is that the universal moral rules are easy for most moral agents to agree with and memorize, and the decision procedure seems to be relatively simple. This benefit contrasts significantly with the disparate guidance buried in the official documents and the counterintuitive guidance (or lack of specific guidance) provided by Fotion and Elfstrom, Axinn, Gabriel, and Hartle. It is also beneficial that Gert's moral rules and decision procedure do not contradict but support the official documents. Gert does not want to replace the common moral system; he wants to explain and justify that system. If Gert argued that the official documents ought to be replaced by his moral theory, he would be contradicting himself. His moral theory merely places limits on the morally acceptable actions that can be performed under the auspices of the official documents.

The short version of Gert's decision procedure is to isolate the morally relevant facts, and then make a decision based on estimates of the consequences of making that decision an institutional policy in the American military profession. His ten questions are useful to this end but not exhaustive.

Most military professionals would not be concerned with grasping the justificatory apparatus that grounds Gert's claim that his moral rules really are universal moral rules. Military professionals would want to know the ten rules, determine if they are supported by their firm intuitions, and subsequently use these rules as a behavioral guide.

Gert's ten rules are so general that each rule could lead to many more rules. For example, the rule "Do not cause pain" could be broken into many other rules that prohibit causing different types and severities of pain, but this could be done only at the expense of making the rules increasingly numerous and complex, which in turn would make the list less likely to be memorized and employed by ordinary moral agents. Moral agents have to work these more detailed rules out over the course of their experience. This process is analogous to the way logicians use small sets of axioms to work out concrete logical problems.

I find none of Gert's moral rules to be counterintuitive, especially given his plausible apparatus for assessing the justificatory merits of proposed violations of these rules. They are sufficiently general to apply the way he says that they do. My support for Gert's list of universal moral rules is reinforced by his plausible explanation for why all universal moral rules have exceptions, especially considering that moral rule violators have a justificatory burden of proof for showing that the exceptions that they propose are morally acceptable.

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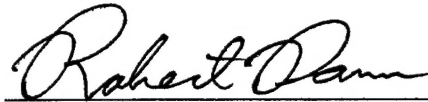
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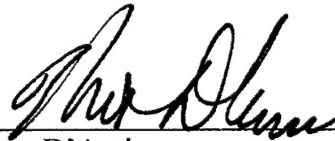
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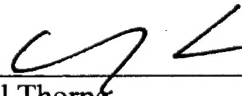
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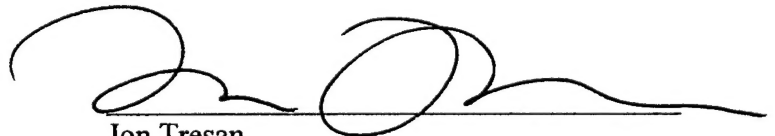
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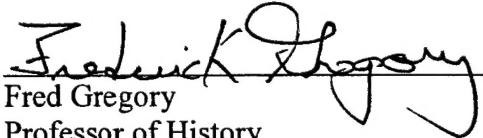
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This dissertation was submitted to the Graduate Faculty of the Department of Philosophy in the College of Liberal Arts and Sciences and to the Graduate School and was accepted as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

August, 2003

Dean, Graduate School

BIOGRAPHICAL SKETCH

Major Matthew W. Hallgarth has served as an officer in the United States Air Force (USAF) since 1988. He pursued his Ph.D in philosophy at the University of Florida (UF) while on an Air Force Institute of Technology (AFIT) scholarship sponsored by the United States Air Force Academy's faculty preparation program.

Major Hallgarth's Air Force career includes service as a deputy chief of protocol for a two-star general, contract specialist, contracting officer, branch chief, and flight chief. Major Hallgarth taught various philosophy courses in ethics, American philosophy, history of philosophy, and philosophy of religion to cadets at the U.S. Air Force Academy from 1993-1996. He also served as chief of the Ethical Development Branch in the Academy's Center for Character Development from 1996-1997.

Major Hallgarth earned his bachelor's degree in philosophy from Baylor University in 1985. He earned his master's degree in philosophy from the University of Oklahoma (on an AFIT scholarship) in 1992.

Major Hallgarth was commissioned through Officers' Training School. He is married to the former _____ They have three children; _____